# THE FERES DOCTRINE AS IT RELATES TO PRIVATE CLAIMS

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## HEARING

BEFORE THE

## SUBCOMMITTEE ON AGENCY ADMINISTRATION

OF THE

## COMMITTEE ON THE JUDICIARY
## UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

THE FERES DOCTRINE AS IT RELATES TO PRIVATE CLAIMS

APRIL 14, 1982

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# THE FERES DOCTRINE AS IT RELATES TO PRIVATE CLAIMS

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WEDNESDAY, APRIL 14, 1982

U.S. Senate,
Committee on the Judiciary,
Subcommittee on Agency Administration,
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 9:40 a.m., in room 2228, Dirksen Senate Office Building, Senator Charles E. Grassley (chairman of the subcommittee) presiding.

Staff present: John Maxwell, chief counsel and staff director; Lynda Nersesian, counsel; Russell Pallesen, staff; and Susan Shirk, chief clerk.

## OPENING STATEMENT OF SENATOR CHARLES E. GRASSLEY

Senator Grassley. We are here today to discuss the Feres doctrine as it applies to the Federal Tort Claims Act. The Feres doctrine derives its name from a 1950 case in which the Supreme Court ruled that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where their injuries arise out of, or are in the course of activity incident to their service to their country.

The Federal Tort Claims Act of 1946 constitutes a limited waiver of the Federal Government's sovereign immunity from suit, allowing an injured party to sue the United States for many, but not all, of the work-related torts of its employees. The Government accepted liability for claims for "money damages for injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." Members of the military or naval forces of the United States were included in the act's definition of employees of the Government. Thus, it might appear that servicemen could sue the Government for tort damages under the act.

As I stated, however, the Federal Tort Claims Act is a limited waiver of sovereign immunity, and in section 2680, certain types of claims are expressly excluded from coverage under the act. Some of these exceptions have been statutorily narrowed or repealed by amendment. Certain other types of exceptions have been read into the act or implied by the courts. The doctrine arising from the *Feres* decision is one of these implicit exceptions.

The *Feres* opinion actually covered three separate cases, all presenting the same issue; whether a serviceman who sustained injury due to negligence of others in the Armed Forces while on active duty and not on furlough, could bring a suit against the Government under the Federal Tort Claims Act. In denying the plaintiffs' petitions, the court laid down what constitutes an implied exception to the Federal Tort Claims Act.

I shall leave it to our expert witnesses to offer an indepth analysis of the Supreme Court's *Feres* decision and its impact on the Federal Tort Claims Act. I would like to quote the conclusion of the court's *Feres* opinion, however, because it was there that the problem facing us today was first mentioned.

The court concluded by saying:

> The Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service. Without exception, the relationship of military personnel to the Government has been governed exclusively by Federal law. We do not think that Congress, in drafting this act, created a new course of action dependent on local law for service-connected injuries or death due to negligence. We cannot impute to Congress such a radical departure from established law in the absence of express congressional command.

We have called this hearing today to examine how this doctrine applies to the private claims entertained by this subcommittee. The subcommittee realizes that a general doctrine or statute occasionally might have an adverse effect on a specific case. As legislators, this is a problem of which we are acutely aware. To overturn legal doctrine on the basis of random inequitable result, however, might not be in the best interests of responsible lawmaking.

Finally, I would like to say that I am a wholehearted supporter of our men and women who are serving our country in the armed services. Our servicemen and women deserve the finest treatment and care that we can reasonably afford. It is in this regard that the subcommittee must evaluate the workings of the Feres doctrine.

Today, we will hear from the Veterans' Administration, the Defense Department, and the Department of Justice, respectively, regarding the existing compensatory scheme provided our servicemen, the probable impact on our national defense of any change in existing law, and a legal analysis of the Feres doctrine as it applies to the Federal Tort Claims Act.

We shall also hear from Senator Claiborne Pell and Senator Chafee, who will testify as to the need for a departure from existing law. I understand that Senator Pell's testimony will focus on the truly grievous case of the late Seaman Charles Day and the difficulties his parents have run into in their attempts to determine the cause of their son's tragic death.

So it is my pleasure at this time to call Senator Pell, and Senator Chafee is with him, and their constituents. I have already said good morning to you. I would like to welcome you and your colleague, Senator Chafee, on behalf of the subcommittee, and thank all of you for sharing your thoughts on this very important matter.

I would like to have you, for the record, even though I have met them, introduce your constituents, and I welcome them here. We are most interested in hearing your views on this very important issue, Senator Pell and Senator Chafee and your constituents.

Would you please proceed as you so desire?

## STATEMENT OF HON. CLAIBORNE PELL AND HON. JOHN H. CHAFEE, SENATORS FROM THE STATE OF RHODE ISLAND, ACCOMPANIED BY MARY AND CHARLES DAY

Senator Pell. Thank you very much, indeed, Mr. Chairman, and thank you particularly for the opportunity of appearing at this hearing and for permitting Mr. and Mrs. Day of Cranston, R.I., to come and be with us before you.

Your committee is considering really one of the most difficult questions of law and public policy—the barriers surrounding lawsuits against the Government by active-duty service personnel. It has been more than 30 years since the Congress undertook to change the law in this area, and we believe that we can give you a compelling example of the need to reexamine this policy.

Mr. and Mrs. Day came to me nearly 4 years ago, just after they were notified that their 19-year-old son, Seaman Charles Day, Jr., had died suddenly at the Philadelphia Naval Hospital. Mr. and Mrs. Day came to me, as their Senator, seeking answers to what caused their son's tragic and inexplicable death. Their search for answers has continued to this very day, and, from talking with them, I know it will continue, and, finally, it has brought them before your committee this morning seeking your help in changing the law in this difficult area.

The story Mr. and Mrs. Day told me in July of 1978 was very troubling and suggested to me that something terribly wrong happened to Seaman Chuck Day during his 21 months in the Navy. He enlisted as a healthy, normal 17-year-old, with a particular interest in electronics. After basic training, Seaman Day was sent to our NATO base in Naples, where he spent 8 months as an electronics technician working on microwave equipment. During this period, Chuck Day developed serious medical problems that finally culminated in his untimely death. He developed problems which are consistent with exposure to microwave radiation: chronic nausea and vomiting, dizziness, and he experienced a weight loss of over 50 pounds in a 9-month period. At this point, Mr. Chairman, I would ask your permission to have inserted in the record two photographs of Seaman Day, one taken 6 months prior to his death, one 1 month prior to his death, and you will see for yourself the difference in his size and his appearance.

Senator Grassley. Without objection, that will be so done.

Senator Pell. I thank you.

[The photographs referred to follow:]

Seaman Charles Day, with mother, 1 month prior to death.

Seaman Charles Day (left) and friends, 6 months prior to his death.

Senator PELL. Examinations conducted by Navy doctors suggested serious problems, including possible heart damage, but Chuck Day never, never received a complete evaluation. Over time, his symptoms grew worse, and when he could no longer keep down food of any sort, he was sent home to the Naval Regional Medical Center in Philadelphia. Five days later, he died in his sleep.

At my request, the Surgeon General of the Navy investigated Seaman Day's death. The outcome of this investigation and of other inquiries which have been made, was inconclusive; and quite honestly, no satisfactory explanation has ever been given for Chuck Day's death.

After months of seeking answers but finding none, I finally introduced private legislation on behalf of Mr. and Mrs. Day to remove the barrier in our law which prevents them from seeking an explanation for their son's death in a Federal court of law. This bill, S. 493, has been cosponsored bv Senator Chafee, and an identical bill has been introduced in the House by Congresswoman Claudine Schneider.

We ask your committee's indulgence, under the tragic circumstances of this case, to permit Mr. and Mrs. Day to take their quest for answers from the Government into a court of law.

In weighing this tragic case, I would ask you to consider an article which appeared recently in the Providence Sunday Journal Magazine, entitled, "What Killed Chuck Day?" This article describes, in far greater detail and much more articulately than I could, the circumstances surrounding this case which warrant the consideration of a court of law.

I would ask, Mr. Chairman, that this fine article be inserted in the record of today's hearing.

Senator GRASSLEY. Likewise, so ordered.

Senator PELL. And also, Mr. Chairman, I would like to have inserted in the record of today's hearing the petition from some 1,300-plus Rhode Islanders, and read the text of the petition.

### WHY DID SEAMAN CHARLES DAY DIE?

### ARE THE MEN AND WOMEN OF THE AMERICAN ARMED FORCES GETTING THE MEDICAL CARE THEY DESERVE?

We, the undersigned, believe those questions need to be answered. We are outraged by the plight of Charles and Mary Day of Cranston, R.I., who have been fighting for 3 years to learn why their son Chuck died in a Navy hospital on July 5, 1978, while on active duty in the U.S. Navy. The attached Providence Sunday Journal tells their story.

We demand that the Days be given their day in court to learn, once and for all, how their son died. We support the efforts of Rhode Island Senators Claiborne Pell and John Chafee to have a private bill, S. 493, passed by Congress to allow the Days to sue in the Federal Court for the "wrongful death of their son."

We also join the Days in their call for a Congressional investigation by civilian and military medical experts of the quality of medical care our men and women of the armed forces are receiving, with special attention to be paid to medical negligence and what the military is doing about it. We, the undersigned, need an immediate reply.

These signatures will be submitted to you for the record.

[The list of signatures to the petition are on file with the subcommittee.]

[A letter and article submitted by Representative Schneider follow:]

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
*Washington, D.C., April 27, 1982.*

Hon. CHARLES E. GRASSLEY,
*Chairman, Subcommittee on Agency Administration,*
*U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: I would like to take this opportunity to submit for the record my views regarding the *Feres* Doctrine as it relates to the case of Mr. and Mrs. Charles Day of Cranston, Rhode Island.

There are three major reasons put forth by the doctrine for exempting sevicemen and women from coverage under the Federal Tort Claims Act.

There exist viable alternatives to damage suits in the form of a uniform and comprehensive system of compensation and benefits available to servicemembers and their relatives.

The relationship between the government and military personnel is distinctly federal in nature and there is no analogous private liability, a requirement of the FICA.

There would be a detrimental effect on military order discipline and effectiveness if servicemembers were permitted to sue each other and the government.

I feel the Day case clearly illustrates the inappropriateness of this doctrine as it applies to complaints of gross medical malpractice or neglect. First, the existing system of compensation and benefits has been unable to supply the parents of seaman Charles Day with any kind of satisfactory explanation for his death. These people have been petitioning the government for years simply to find out what happened to their son. Surely, thay have a right to know as much or more that a right to monetary damages.

Second, the federal relationship notwithstanding, there is clearly an analogous private liability for medical malpractice. This, in some ways, is the entire point. If we do not hold the military as responsible for its peacetime medical care as we hold private practitioners, we do indeed make our military personnel second class citizens.

This leads directly to the third issue of military discipline. Can we really classify the acceptance of negligent medical care as part of military discipline? I certainly appreciate that allowing for lawsuits within the military can present a threat to order and discipline. Neither of these, however, are preserved or strengthened by turning a blind eye to negligence and errors. It would be a mistake to allow ourselves to hide behind an abstract concept and not deal with a problem that is apparently very real. The Day case is not an anomaly. I understand that there are some 1,300 claims of medical negligence outstanding against the military. Instead of protecting order, avoidance of responsibility for medical care will foster distrust and fear within the military.

The case of Seaman Day is especially tragic because it seems to have been so unnecessary. His complaints were passed off as entirely psychological. Opportunities for testing and evaluation were not pursued. We owe it to the men and women who serve this country to provide them with competent medical care. We owe it to ourselves to find out whether or not this is the case.

Again, thank you for your time and consideration. I think you will find the enclosed article from the Providence Journal very informative.

Sincerely,

CLAUDINE SCHNEIDER,
*Member of Congress.*

Enclosure.

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[From the District Lawyer, March-April 1982]

## UNCLE SAM'S HOLD OVER VETS

(By Lewis M. Milford and Ronald Simon)

### INTRODUCTION

In the past few years, the problems of this nation's veterans have commanded extensive media attention. Vietnam veterans in particular have felt that they have many unsettled debts with the country. Much of this disenchantment concerns the exposure of veterans to toxic chemicals and the government's belated efforts to deal with the controversy.

As with many controversial public policies, these disputes have found their way into the courts. The cases include veterans' problems with Agent Orange, exposure to nuclear radiation, testing of LSD, and the psychological stress caused by wartime, especially the effects of service in Vietnam.

Attorneys who have been approached by veterans with these and other problems have been drawn into an arcane area of law that is virtually unknown to most members of the bar and the general public. Although there are over 30 million living veterans and as many as 90 million people potentially eligible for veterans' benefits, surprisingly little is known about the legal rights of veterans.

This lack of knowledge undoubtedly results from various barriers that confront veterans who seek access to the courts. The military services are virtually immune from suit. Although the availability of the Veterans Administration benefit programs for veterans injured in service is cited by the courts to justify military immunity, a statute provides that benefit decisions of the VA cannot be reviewed by the courts.[1] The final barrier that keeps the veteran out of the legal system is a Civil War period statute that limits to ten dollars the amount that an attorney may charge a client who is seeking VA benefits.[2] This fee limitation in effect has prevented attorneys from representing veterans, except in the rare instances of pro bono representation. Because recent events have led veterans to seek assistance from lawyers, this article attempts to respond to the preliminary questions that lawyers will need to address in providing legal assistance to veterans compensation.

## MILITARY IMMUNITY

The sovereign immunity of the military was taken up by the Supreme Court in 1950 in *Feres* v. *United States*,[3] an action brought on behalf of a serviceman who was killed in the alleged negligent burning of a barracks. In the *Feres* decision, the Supreme Court constructed the only judicially-made exception to the Federal Torts Claims Act (FTCA)[4] and held that the Act does not authorize such suits. Although the FTCA and its legislative history were silent on the issue, the Court found that the Congress had not intended the FTCA to eliminate military immunity.[5] The Court reasoned that the establishment of the Veterans Administration, which provides benefits to veterans on a no-fault basis, must have been intended by Congress to be an exclusive remedy[6] and that the uniformity of benefits provided in such an equitable system would render unnecessary any relief available under the FTCA.[7] The court also relied on a long series of decisions that gave great deference to the autonomy of the military.

Two arguments were used to support the traditional reluctance of the courts to look behind military decisions. The first was the so-called "distinctively federal" relationship between the soldier and the military. Since FTCA claims are based on state law, Justice Jackson reasoned that it would be illogical, inequitable, impractical, and unworkable to have the military reviewed under local standards. A second argument, and the one that has been at the core of all later decisions in the area, is the belief that review by civilian courts would undermine military discipline.[8]

Despite the fact that the *Feres* doctrine has been harshly criticized,[9] the statute has not been changed by Congress. The courts have repeatedly relied on its rationale that FTCA recovery would undermine military discipline even though the underlying claims have included situations, that are far removed from concerns about military discipline. The perseverence of the doctrine, despite its harsh consequences, is perhaps best expressed by the following colloquy between a U.S. District Court judge and a government lawyer:

Judge: [A]s I read the law, it doesn't matter if they stood up there and said "one, two, three, left, right, left," and marched them over a cliff. You'd be protected under *Feres*.

Lawyer: Yes, your honor.[10]

## CRACKS IN THE WALL OF MILITARY IMMUNITY

Despite and perhaps because of the draconian harshness of the *Feres* doctrine, a few cracks in the wall of military immunity exist. Avenues that allow plaintiffs to escape *Feres* include litigation that, 1) is based on non-military activities, 2) is directed at wrongs that occurred after discharge from the military, 3) is brought on behalf of a relative of a veteran, 4) is based on constitutional tort theory, and 5) is not brought against the government.

From the earliest days of the doctrine, courts have disagreed about the application of the *Feres* doctrine to injuries "not incident to service."[11] A number of decisions allow review of on-duty activities as long as the injury did not stem from an official military relationship between the parties and as long as the recovery itself would not tend to undermine military discipline.[12]

In *Thornwell v. United States*,[13] the plaintiff was involved in various experiments while in the military, including extensive sensory deprivation and administration of LSD. Although recovery for injuries caused by the human experimentation program was held to be barred by intra-military immunity, the plaintiff was allowed to maintain an action based on the failure to inform and warn the plaintiff of the dangers of what was done to him *after* he left the service."[14]

A third route around *Feres* that has met with some success is litigation brought on behalf of a relative of a veteran. In *Hinkie v. United States*,[15] District Judge Shapiro in the Eastern District of Pennsylvania allowed the children of a veteran exposed to nuclear tests to sue for their birth defects. In refusing to follow a recent decision that denied the children of Agent Orange victims the right to sue,[16] the Court held that it would in no way further the policy rationales of the *Feres* doctrine (particularly the need for discipline) to deny compensation for birth defects of a veteran's child.

A fourth path around *Feres* is to sue based on a constitutional tort theory.[17] In a case by a veteran exposed to nuclear radiation, the Third Circuit, in an *en banc* review, recently rejected this argument.[18] In what the dissenters called "radical judicial legislation with totalitarian effects," the Third Circuit Court of Appeals held that soverign immunity precluded the implication of a cause of action under the Constitution. The majority pointed out that the implication of a Constitutional remedy was barred by the Congressional creation of the VA as the "exclusive" remedy. The Court decided that the impact on military discipline and the availability of veterans' benefits were "special factors" precluding suit under recent Supreme Court decisions on the availability of damage actions implied under the Constitution.[19] The dissenters warned that "In a democracy we have far more to fear from the lack of military accountability than from the lack of military discipline or aggressiveness."[20]

Finally, some veterans have sought relief totally outside the government. The most widely publicized of these cases is the Agent Orange litigation being conducted on a product liability theory against the chemical companies that manufactured the herbicide.[21] Even in that action, *Feres* has become an obstacle.

The chemical companies argue that they are covered by *Feres* because they made the products according to government specifications. If the government is immune from suit, they assert, they should share in the government's immunity. Citing a Supreme Court decision in which a pilot was prevented by *Feres* from suing the manufacturer of a malfunctioning life support system,[22] the federal court in New York held that there clearly is a "government contractors' defense," which allows a government contractor to share the immunity of the military. The breadth and extent of the immunity of the contractor has yet to be determined in the Agent Orange litigation.[23]

## THE VETERANS ADMINISTRATION

The Veterans Administration's Board of Veterans Appeals (BVA) annually decides over 35,000 cases that cannot be reviewed by the courts. Although these decisions involve income maintenance, disability compensation, health care, education, housing and even burial benefits, no reporting service covers these decisions and they are not available in libraries. A microfiche index of recent agency decisions is available at the BVA headquarters in Washington.

The absence of judicial review and the lack of knowledge in the legal community about the VA are even more troubling considering that it is the third largest federal agency. The VA employs nearly 200,000 people; it operates 172 medical centers (the largest health care delivery system in the world); and its budget is about $22 billion per year. Because the average age of World War II veterans is approaching 60, the VA will be increasing its role as the largest and most comprehensive provider of nursing home and extended care for senior citizens. Lawyers who do get involved are shocked and exasperated by the very limited range of challenges to VA decisions.[24]

## VA BENEFITS

In addition to burial, insurance, vocational rehabilitation, education, and housing subsidies (in the form of mortgage guarantees), the major VA benefits are medical care and income in the form of pensions and disability compensation. The VA provides medical care ranging from inpatient hospital and dental care to psychiatric care.[25] The key limitation in this area is that, although veterans and their families are eligible for VA service, they are provided only "within the limits" of VA capability.[26] *This means that there is no statutory right to receive VA medical services.* Thus, although the Veterans Administration provides healthcare for millions of Americans, services are not a matter of right and their denial is not subject to judicial review.

The other major area of veterans' benefits is disability compensation and pensions. In fiscal year 1980 over 2.5 million families were receiving funds from compensation programs. In order to obtain benefits in "compensation" cases, it must be shown that a disability or death is "service-connected." [27] "Service-connection" does not require that the injury be related to a combat injury. In fact, many service-connected disability cases are due to automobile accidents. Instead, service-connection depends on a temporal relationship, that is, the injury must be concurrent in time with military service.[28]

The VA pension programs cover over two million financially eligible veterans who have served during periods of war as defined by statutes [29] and who are either over 65 or totally and permanently disabled.[30] Surviving spouses, children and dependent parents also can qualify for pensions.[31]

## LIMITATIONS ON ELIGIBILITY

There are two important limitations on eligibility for veterans' benefits. Veterans are not eligible for benefits either if they have certain types of "bad discharges" or if their injury is due to their "own willful misconduct."

Military discharge law is a very complicated area that includes discharge determinations by military service itself, two separate post-discharge review boards, decisions by the federal courts and the VA's own jurisdiction to make "character of service determinations." This intricate area of law is fully explored in the recently published *Military Discharge Upgrading and Introduction to Veterans Administration Law.*[32]

Determination of ineligibility based on "willful misconduct" also has generated many disputes.[33] For example, despite contrary determinations by the Social Security Administration and general medical science that alcoholism is a disease, the VA still maintains that alcoholism is not a compensable disease because it is due to the veterans' own willful misconduct. The VA has the same policy toward drug addiction.

## VA PROCEDURES [34]

The VA benefits application and decision-making process is relatively simple. Initial applications are made to a VA regional office. There is at least one regional office in each state.[35] The initial decision on a claim is called a "rating" and is made by a "rating board." [36] If the VA denies the claim, it sends a determination called a Notice of Decision and the veteran has 60 days to submit additional evidence and/or request a hearing.[37] A hearing is held in a regional office by a three-member board.[38] If the decision is negative, the veteran may challenge it by filing a Notice of Disagreement. Upon receipt of the Notice of Disagreement, the VA can either change its decision and grant relief or prepare a Statement of the Case, which is the final decision of the regional office.[39] The veteran challenges the final decision of the regional office by filing a "Substantive Appeal." [40] This takes the case to the Board of Veterans Appeals (BVA), which sits in Washington, D.C. (All cases are heard in Washington except for travelling panels, which are occasionally sent to other cities.)

The members of the BVA are presidential appointees. The BVA sits in 15 panels of three members each. On 14 of the 15 panels, two of the three members are attorneys and one is a doctor. On the 15th panel, all three members are lawyers. The panels specialize in particular areas (e.g., psychiatric cases or radiation cases).

Each BVA section handles approximately 40 cases per week. Each section employs seven or more staff attorneys who prepare the decisions.

By statute, the BVA is an independent body, but it is required to follow VA regulations and opinions of the agency's general counsel. Only one out of every eight decisions by the Regional Offices is reversed. (One out of every six is sent back to the regional office for further development.)

Because of the general absence of attorney representation and the prohibition on judicial review, it is not surprising that the agency's internal rules, guidelines and decisions are often not available to the public. Many important rules and policy guidelines are located in internal VA documents called "Manuals," "Circulars," "Interim Issues," and "Program Guides." These documents influence decisions at local levels and at the BVA, but they are seldom cited. As a result, it may be necessary to consult the annually published VA index of publications[41] and to make FOIA requests to obtain all relevant policy.

A person who loses at the BVA level can seek a reconsideration.[42] Each reconsideration includes a panel that is double in size and includes the same members who denied the original claim. Reversals on reconsideration are rare. A full exhaustion of administrative possibilities also might include a special appeal to the administrator of the VA or an "administrative review" by the VA central office.[43]

The unsuccessful veteran and his or her advocate then face the cold stare of the prohibition on judicial review. The language of the statute, [38 U.S.C. §211(a)] does not leave room for many exceptions:

". . . the decisions of the Administrator on any question of law or fact under any law administered by the Veterans Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise."[44]

## EXCEPTIONS TO § 211(A)

A number of exceptions to the § 211(a) prohibition have developed. In *Johnson* v. *Robison,*[45] the statutory denial of veterans' benefits to conscientious objectors was challenged. The Supreme Court held that a constitutional challenge to legislation was not a review of a "decision" of the Veterans Administration and thus not barred by § 211(a). The Court also indicated that if 211(a) were read to bar such actions, serious questions about the constitutionality of the statute would be raised.

A second exception to § 211(a) was developed in *Plato* v. *Roudebush.*[46] In that case a widow successfully challenged the termination of her benefits without a due process hearing. The Court held that the constitutionality of VA procedures are also subject to court review.

A third exception to § 211(a) involves challenges alleging that VA regulations are inconsistent with underlying statutes or that the regulations are outside the statutory authority of the VA Administrator. The leading case in this area is *Wayne State University* v. *Cleland,*[47] and a number of recent local decisions deserve mention.

In *Carter* v. *Cleland,*[48] a widow challenged a VA policy that made her ineligible for widows' benefits. The U.S. Court of Appeals for the District of Columbia reviewed the purposes of § 211(a) and said that one of its goals was to avoid tampering with the technical expertise that was part of the VA's decision-making. Review of VA regulations is allowed only if that review does not require a court to consider the facts of individual cases and the day-to-day activities of the agency.

In *Kirkhuff* v. *Cleland*[49] a female veteran challenged a VA policy that denied medical services for the normal delivery of a child. The District Court held that the challenge was allowed since the veteran was challenging the regulation itself (its constitutionality and consistency with VA statutes) and thus did not involve review of an individual decision as prohibited by § 211(a). The VA was ordered to consider the case on its merits without reliance on the invalidated regulations.

The authors represent veterans in a case that recently saw Federal District Judge June Green invalidate three separate sets of internal VA documents that were found to be rules used by the VA to adjudicate claims involving exposure to nuclear radiation.[50] This challenge did not attack the substance of the rules themselves, but rather the fact that they were not promulgated through public rule-making under the APA and that two of the three were not published under the FOIA.

## ROUTES AROUND VA

Given the very limited exceptions to § 211(a) and the restriction on attorneys' fees, advocates seeking compensation for veterans have attempted to find ways to avoid the VA entirely. One possible route is through the Boards for Correction of Military Records (BCMR).[51] Each branch of the military service has a board created by statute that "may correct any military record of that department which . . . it considers necessary to correct an error or remove an injustice." At this forum, the accuracy of the underlying military records can be challenged. For instance, having failed to establish "service-connection" at the VA, one could seek a change in military medical records that would establish that a medical problem either started in service and was ignored or was not properly diagnosed. The VA is bound by decisions of the BCMRs and, in addition, the BCMR relief can be used in the Court of Claims to obtain back pay and other benefits from the military services. Decisions of the BCMR also are reviewable in the courts.[52]

VA determinations have been challenged under the Privacy Act 5 U.S.C. 552(a). These actions are framed in terms of a challenge to the factual accuracy of a government record.[53]

## CONCLUSION

Ostensibly, veterans have a special status in this country. Both houses of Congress have standing committees on veterans's affairs and veterans have their own federal agency. In addition, special statutes protect veterans in federal employment and both the Small Business Administration and the Department of Labor have programs for veterans.[54] A cursory review of the U.S. Code indicates that veterans are a favored class of citizen.

However, a careful study of the status of veterans reveals some of the encumbrances and burdens of being "special." The special relationship to the military has been held to bar not only Federal Torts Claims Act litigation but also constitutional torts. The sovereign immunity of the government even protects federal contractors. The children of veterans have been barred from pursuing litigation. The VA benefit system has been held to be exclusive and therefore to preempt even state law claims. The courts that have barred litigation because of the *Feres* doctrine have repeatedly pointed to Congress as the avenue for change.

Last year, the Senate passed a bill that would have allowed judicial review of the VA and eliminated the maximum ten-dollar fee for attorneys. The bill died in a House committee despite endorsement of the ABA, VFW, and Disabled American Veterans. This year the Senate is considering the same bill again,[55] but its future course is even less assured. The VA has reversed the position of the last administration and now oppose judicial review. While VA estimates show that nearly three times more veterans will be successful at the BVA if there is judicial review, the VA argues that judicial review will work to the detriment of veterans. (No specific details have been advanced to support this position.) Many people would not find convincing an argument that says veterans would be harmed by being given the same legal rights given to other citizens. But in an environment that is closed to outside review, such arguments are not uncommon.

### Footnotes

[1] 38 U.S.C. § 211(a).

[2] 340 U.S. 135 (1950).

[3] 340 U.S. 135 (1950).

[4] The FTCA gave the federal courts exclusive jurisdiction of civil actions based upon tort claims against the United States for money damages. 38 U.S.C. 1291 et seq.

[5] The Act contains only one exception that generally relates to military-type activities, but none as broad as carved out in *Feres. See* 28 U.S.C. § 2680(j) (claims arising from combat in time of war by the armed forces as excluded from the FTCA waiver of immunity). The Act also enumerates thirteen other specific exceptions to the statutory waiver. *See* 28 U.S.C. §2680.

[6] The VA benefit system is not entierely a no-fault system since benefits can be denied in situations when the veteran has committed "willful misconduct" (38 C.F.R. 131/n), based on the character of the discharge (38 U.S.C. 101, 3101) or in cases of imprisonment for felonies in certain situations (38 U.S.C. 2113).

[7] The Court did not discuss the benefit system in depth or compare with any rigor the significant differences between the VA compensation scheme and traditional tort recovery.

[8] Ironically, the Supreme Court foresaw no signficant discipline problem from application of the FTCA in federal prisons. *See, United States* v. *Muniz,* 374 U.S. 150 (1963).

[9] *See* note "From *Feres* to *Stencel:* Should Military Personnel Have Access to FTCA Records?" *Michigan Law Review* 77:1099 and Hitch, "Federal Tort Claims Act and Military Personnel," 8 *Rutgers Law Review* 316 (1954).

[10] *Jaffee* v. *United States,* 468 F. Supp. at 635 (DNJ 1979).

[11] *See* Jacoby, "The *Feres* Doctrine." 24 Hastings Law Journal 1281 (1973) and Rhodes, "The *Feres* Doctrine After 25 Years," AFL Spring 1980.

[12] *See Downes* v. *United States,* 249 F. Supp. 626 (EDNC 1965) and *Lee* v. *United States,* 261 F. Supp. 252 (CD Cal. 1966).

[13] 471 F. Supp 344 D.D.C. (1979).

[14] In two radiation cases, the courts ruled that *Feres* did not bar such failure to warn actions brought by veterans exposed to radiation from nuclear weapons tests. *See Broudy* v. *United States* No. 793829 (9th Cir. Nov. 1981); *Everett* v. *United States* (C-2-79-127 S.D. Ohio 1980). However, Vietnam veterans failed at the district court level to press a similar claim. *See In Re Agent Organge Litigation,* 506 F. Supp. 762 (EDNY 1980). In the Agent Orange litigation, the court said that no independent duty to warn arose after the plaintiffs were discharged from service. Because any in-service tort was "continuous" in nature, the *Feres* bar continued to immunize late actions by the federal government. New litigation was recently filed on this point. *See also Lombard* v. *United States,* No. 81-0425 (D.C.C. Sept. 30, 1981) (*Feres* bars failure to warn cause of action).

[15] No. 79-2340, ED PA, Oct. 15, 1981.

[16] *See In Re Agent Orange,* 506 F. Supp. 762 (EDNY 1980).

[17] *Bivens.* v. *Six Unknown Narcotics Agents of the Federal Bureau of Narcotics*, U.S. 388 (1971); *Carlson* v. *Green*, 446 U.S. 14 (1980); and *Davis* v. *Passman*, 442 U.S. 228 (1979).

[18] *Jaffee* v. *United States of America*, No. 79-1543 (3d Cir. Nov. 1981). *See also Lombard* v. *United States*, No. 81-0425 (D.D.C. Sept. 30, 1981) (*Feres* bars constitutional tort actions). *See* Davis, "Sovereign Immunity: An Anathema to the Constitutional Tort," 12 *Santa Clara Law* 543 (1972).

[19] The majority opinion ignores an established body of law in which a broad range of military decisions are reviewed by the court. *See O' Callahan* v. *Parker*, 395 U.S. 261; *Toth* v. *Quarles*, 350 U.S. 11 (1955); *Reid* v. *Covert*, 354 U.S. 1 (1956). Courts also review military administrative decisions in areas of both discharges (*Hammon* v. *Brucker*, 355 U.S. 579 (1958)) and promotions. *U.S.* v. *Eamit*, 453 F. 2d 197 (CA5 1971), Peck "The Justices and the Generals: The Supreme Court and Judicial Review of Military Activities" 70 *Military Law Review* 1, 65 (1975). The standards for when the courts can review military decisions are set out in *Mindes* v. *Seaman*, 453 F. 2d 197 (5th Cir. 1971).

[20] *But see Wallace* v. *Chappell*, 661 F.2nd 729 (9th Cir. 1981). (*Feres* does not bar actions concerning "recognized" constitutional rights, and military officials enjoy only qualified immunity excuses in unusual circumstances.)

[21] *See In Re Agent Orange* litigation, 635 F. 2d 987 (2 Cir. 1980) Cert. denied 12-14-81.

[22] *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666 (1977).

[23] A *cert.* petition in this case was denied in December 1981 which let stand a Second Circuit decision that there was no federal question jurisdiction. The Circuit Court reasoned that even though the interests in the case were federal in nature the absence of congressional direction as to which interests to favor (the contractor or the veteran) led the Court to decline to fashion a federal common law cause of action. The practical importance of this decision is that it leaves each plantiff's claim dependent on the state's statute of limitations. The case itself continues because of the diversity jurisdiction that exists.

One interesting question that the litigation now presents is which law will be applied. Since conflict of laws relies heavily on the principle *situs* of the injury, Vietnamese law may determine the relief U.S. veterans can obtain from U.S. war contractors. *Day and Zimmermann* v. *Challoner*, 423 U.S.C. (1975) held that under Texas conflicts of laws principles, Combodian law would be applied to a case based on a howitzer shell that malfunctioned in Combodia.

[24] An excellent discussion of judicial review of the VA can be found in "Subjecting the VA to Judicial Review" by Dean K. Phillips in *Strangers at Home*, Figley and Leventman, Praeger, 1980.

[25] These medical services are available: 1. to veterans who have a service-connected disability, 2. to those who have a non-service connected disability but cannot afford private care and 3. veterans older than 65 who have a non-service connected disability. Medical care also is provided to widows and children of veterans who had total service-connected disability at time of death. 38 U.S.C. 610; 38 C.F.R. 17.45-47.

[26] Priorities for treatment are set out in 38 C.F.R. 17.49.

[27] 38 C.F.R. 3.303 et seq.

[28] 38 U.S.C. 101.

[29] 38 U.S.C. 101, 521.

[31] Providing details about these programs is difficult because Congress has enacted new programs but allowed veterans to receive benefits under the existing ones prior to the change. The program in existence prior to 1960 is called the "Old Law" Pension Program. The program enacted in 1959 is referred to as the "Section 306" Pension. In 1978 the Congess enacted the "Improved Pension." At this point the overwhelming majority of veterans and surviving spouses receive benefits under the "Section 306" Pension. People receiving the "Old Law" or "Section 306" may opt for the "Improved Pension." Although the "Improved Pension" would apparently give greater benefits to a great number of veterans and surviving spouses, they surprisingly have stayed in the older pension programs.

[32] Published by the Veterans Education Project, Dept. M, P.O. Box 4213, Washington, D.C. 20015.

[33] 38 C.F.R. 3.1(N).

[34] This area is covered in greater detail in the *Discharge Upgrade Manual*, Chapter 27.

[35] The local regional office is at 941 North Capitol St., N.W., Washington, D.C. 20421.

[36] VA *Manual*, Chapter 45 and 38 C.F.R. 3.151.

[37] 38 C.F.R. 3.160(d).

[38] 38 U.S.C. 19.118(a).

[39] 38 C.F.R. 19.115.

[40] 38 U.S.C. 4005; 38 C.F.R. 13.120.

[41] VA Index 1-03-1.

[42] 38 C.F.R. 19.151.

[43] VA Manual M 21-1; 38 C.F.R. 3.101(3).

[44] A 1970 amendment to 38 U.S.C. § 211(a) eliminated a line of cases which allowed review on the basis that the language of the prior statute included the phrase "claim for benefits" which the courts had interpreted to prohibit review only of initial claims.

[45] U.S. 361 (1974).

[46] F. Supp. 2195 (D. Md. 1975).

[47] 590 F. 2d 627 1978.

[48] *Carter* v. *Cleland*, 643 F. 2d 1 (D.C. Cir., 1981).

[49] 516 F. Supp. 351 (D.D.C. 1981).

[50] Developing such a procedural challenge involves a somewhat circuitous legal route. VA decisions on benefits are not covered by the rulemaking provisions of APA because 5 U.S.C. 553(a) (2) specifically exempts decisions on claims for "benefits." However, the VA by regulation bound itself to follow the APA and the courts have held that such a commitment by an agency consti-

Senator **Pell**. Thank you very much, Mr. Chairman, for giving me this opportunity to testify, and I know that my colleague, Senator Chafee, has an equally strong statement.

Senator **Grassley**. Thank you.

Senator Chafee?

Senator **Chafee**. Thank you, Mr. Chairman.

First, I would like to thank you for conducting these hearings, which are of such importance to the American public as a whole, but of course, especially to Mary and Charles Day of Cranston, R.I.

Mr. Chairman, the untimely and tragic death of Seaman Charles Day has never been entirely or satisfactorily explained. All his parents know is that 21 months after their son entered the U.S. Navy as a healthy young man, he died after several months of deteriorating illness. Despite an investigation by the Surgeon General of the Navy, Mr. and Mrs. Day have been provided no full explanation of their son's death.

As a result of this failure to achieve a complete accounting of Seaman Day's death, Mary and Charles Day have only one recourse: A full hearing in a court of law.

I was pleased to join with our distinguished senior Senator, Senator Pell, in introducing legislation which would permit the Days to bring suit against the Government. We are aware that such legislation stands in contrast to the Feres doctrine. The compelling circumstances surrounding this case, nevertheless, warrant your most serious consideration as you deliberate on the general issue of the Feres doctrine and private claims.

Senator Pell has provided the subcommittee with a complete outline of the details of this case as they are known. I will not repeat them here, but I wish only to state that I believe that the case of Seaman Charles Day fully warrants an exception to the Feres doctrine in order that Mr. and Mrs. Day may pursue their search for an explanation of their son's death.

Again, I want to thank you for giving me this opportunity to appear before you, for including us so swiftly in your deliberations, and for allowing the subcommittee to consider this important issue.

Senator **Grassley**. Well, we thank both of you for your testimony, and anything you would like to insert in the record will be so inserted, and of course, the record will stay open for the appropriate period of time.

Senator **Pell**. I would add here that Mr. and Mrs. Day are with us, and if there are any questions you would like to ask them——

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tutes legal obligation that can be enforced in the courts. *Gott* v. *Cleland*, 80-0906, D.D.C., Oct. 1, 1981.

[51] The Boards are established by statute. 10 U.S.C. 1552. One interesting question that involves the BCMRs is the appropriate statute of limitations. Although 10 U.S.C. 1552(b) created a three year statute of limitations from the time of discovery of the error until filing at the BCMR, the BCMRs have discretion to and commonly do waive the statute of limitations. A second question then arises as to the length of time one has to challenge the administrative decision of the BCMR. *See Baxter* v. *Claytor*, (No. 77-1984 D.C. Cir. April 24, 1981) and *Manual on Discharge Upgrading*, Chapter 9.

[52] *See* Glosser and Rosenberg, "Military Correction Boards: Administrative Process and Review by U.S. Court of Claims" 23 *Am. U.L.* 391 (1973).

[53] *Miller* v. *VA*, No. 79-1595, U.S.D.C. (Kan.) July 16, 1980 and *R.R.* v. *Army* 482 F. Supp. 77 (D.D.C.) 1980.

[54] Although these programs have been criticized for not providing required services to veterans, the Veterans Affairs Committees have often been quite frustrated at their inability to influence these "other" agencies.

[55] S. 349.

Senator GRASSLEY. Yes, we would like to hear from them. First of all, do you have anything you would like to say before I ask a few questions?

Senator PELL. No, I have nothing more to add, except to say that I have followed this closely now for 4 years and have come to be more and more convinced of the merits of the case of the Days. I think they have done a wonderful job of holding the Government's feet to the fire and our feet to the fire, and I hope they continue to do so, because that is the way justice is finally rendered. And they are here for any specific questions that you might have.

Senator GRASSLEY. But you do not care to make a statement, either Mr. or Mrs. Day?

Mrs. DAY. No, except thank you very much for listening to us.

Senator CHAFEE. Mr. Chairman, if I could just make one point. The Days have conducted this effort on their own part which has required of them tremendous amounts of time and indeed, expense, and it seems to me this is an incredible burden to place upon private citizens. And, as you know, from my background and association with the Navy, I believe that the Navy normally does an excellent job in caring for its people. But, what we want here is more of an explanation of what took place. And, it seems to me, it should not require individual citizens to go to the extent that Mr. and Mrs. Day have had to undertake.

Senator GRASSLEY. Of course, this hearing is not being conducted just for the consideration of S. 493. That is the private bill introduced on your behalf, Mr. and Mrs. Day, by your Senator. But, I would like to ask you a few questions about the path that led to the introduction of the bill, regardless.

First, did you ever request an administrative hearing on the matter that you had with the Defense Department?

Senator PELL. I have engaged in many conversations with the Defense Department on behalf of Mr. and Mrs. Day, but there is no mechanism for an administrative case in cases of this type. The absence of such a mechanism is why we are before your subcommittee this morning.

Senator GRASSLEY. I would like to ask Mr. and Mrs. Day, but if you would like to speak for them, too, either one of my colleagues, you can do that. I would like to ask what type of requests have been made of the Department of Defense. In legal jargon, what administrative remedies have been pursued. If you would care to respond to that in writing, that is all right, too.

Senator PELL. My understanding is that there is no administrative remedy. The sole remedy is the passage of a private bill allowing them to go into Federal court.

Senator GRASSLEY. Well, maybe the term I used, "administrative remedy," leading to some sort of an adjudication, is not necessarily what I had in mind. For instance, have there been requests made under the Freedom of Information Act?

Senator PELL. No.

Senator GRASSLEY. Have there been any military records requested?

Senator PELL. Yes, we have.

Senator GRASSLEY. Those have been requested, OK. And you have not been able to get any of these records to this point?

Senator **Pell**. We have had some records supplied by the Navy, but not all.

Mrs. **Day**. Senator Grassley, I asked for his medical records and his personnel records about 2 months after my son had passed away and after I received the first autopsy report from Philadelphia, which stated that there was no cause of death, or undetermined causes of death. I did receive his medical records and his personnel records, but everything was listed "top secret" on these papers.

Senator **Grassley**. Well, then, maybe when the Department testifies, I will have a chance to ask them what is holding up your receiving those records.

Mrs. **Day**. Now, after the second autopsy, which the Army Institute of Pathology did, the cause of death was put, "probable cardiac arrhythmia." They do not even know what caused my son's death, and this is what I want to know. I want to go into Federal court to find out what caused my son's death. He is the oldest of seven children. I want to know, for my other children's safety. And also, I have a boy now who is in the U.S. Marine Corps, and I pray that he does not get sick; I pray.

Senator **Grassley**. Well, I have only had one of my five children in the military service, and thank God, we have not gone through what you have gone through. And I am not sure that, not being in your place, not walking in your moccasins, I can fully appreciate what you have been through. But obviously, your problems deserve to be redressed, and your Senators have been helping you, I know, and hopefully, we can be helpful in the process, as well. We sympathize with you. We know it has probably even been troublesome for you to come here to share your grief with us. We appreciate that, for the record. We thank you very much for taking time out of your busy schedules. And I would invite you to keep in communication with me and my staff, as well as your own individual Senators. And I would invite Senator Chafee and Senator Pell, if in the process that I can be of any help to you, feel free to ask me.

Thank you, all of you very much for your testimony.

Senator **Pell**. Thank you very much for your hospitality, and thank you for your reassuring words.

Senator **Chafee**. Thank you, Senator.

Mrs. **Day**. Thank you, Senator.

Mr. **Day**. Thank you, Senator.

[A petition, letters, and articles submitted by Senator Pell follow:]

### WHY DID SEAMAN CHARLES E. DAY DIE? ARE THE MEN AND WOMEN OF AMERICA'S ARMED FORCES GETTING THE MEDICAL CARE THEY DESERVE?

We, the undersigned, believe those questions need to be answered. We are outraged by the plight of Charles and Mary Day of Cranston, R.I. who have been fighting for three years to learn why their son Chuck died in a Naval Hospital on July 5, 1978 while on active duty in the U. S. Navy. The attached Providence Sunday Journal tells their story.

We demand that the Days be given their day in court to learn once and for all how their son died. We support the efforts of Rhode Island Senators Claiborne Pell and John Chafee to have a private bill (S-493) passed by Congress to allow the Days to sue in Federal Court for the "Wrongful death of their son."

We also join the Days in their call for a Congressional investigation by civilian and military medical experts—of the quality of medical care our men and women of the armed forces are receiving. Special attention should be paid to medical negligence and what the military is doing about it.

We the undersigned need an immediate reply:

Mayor Edward D. D. Prete, city of Cranston, 869 Park Ave., Cranston, R.I.
Claudine Schneider, Member of Congress, Rhode Island, Second District.
Claiborne Pell, U.S. Senator, Rhode Island.
John H. Chafee, U.S. Senator, Rhode Island.

NOTE.—An attached list containing over 1,300 signatures is on file with the Subcommittee on Agency Administration.

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NATIONAL ASSOCIATION OF ATOMIC VETERANS,
*Burlington, Iowa, April 8, 1982.*

*To Whom It May Concern:*

As State Representative of the National Association of Atomic Veterans and also as Chairman of the R.I. Chapter of NAAV, comprising of some 100 atomic veterans, we are giving our full backing to Mrs. Mary Day.

She has the full support of the entire R.I. Chapter of NAAV, in her efforts to bring some relief and justice for the premature death of her son.

Sincerely,

SAM SCIONE,
*NAA V State Representative.*

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UNITED STEELWORKERS OF AMERICA,
LOCAL 7255, AFL-CIO-CLC,
*April 9, 1982.*

MRS. MARY DAY,
*Cranston, R.I.*

DEAR MRS. DAY: In response to the article in the Magazine section of the Sunday Journal, March 28, 1982, Local #7255 would like to inform you that you have both our support and backing in search for the facts of your Son, Charles E. Day, Jr., death in 1978.

We feel that an injustice is being done to you and your family by not allowing you the complete knowledge of the facts leading to the course of death on July 5, 1978.

We believe that all Parents with Sons or Daughters serving in the Military should be granted the right openly to all information leading to and causing their death.

Sincerely,

JAMES J. O'DONNELL,
*President.*

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[From the Providence (R.I.) Sunday Journal magazine, Mar. 28, 1982]

## WHAT KILLED CHUCK DAY? HIS PARENTS BLAME MALNUTRITION, MALPRACTICE AND MICROWAVE RADIATION—THE NAVY WON'T TALK ABOUT IT

(By Christopher Scanlan)

I don't know what killed Seaman Chuck Day, but what I do know troubles me.

He was only 19 when he died in 1978, a high school dropout from Cranston who joined the Navy to get away from home and a job washing dishes. He hoped to find what the ads promise young men like him: not just a job, but an adventure. Instead, he got sick and died in his sleep in a Navy hospital in Philadelphia. To this day, his family doesn't know why.

His mother has been trying for almost four years to find out, but Mary Day is neither a doctor nor a trained investigator. She's a waitress, a wife and the mother of six other children. Her technique was "nagging," as she puts it. Badgering the Navy for answers. Writing letter after letter to public officials. Persuading her senators and congressmen to help her crack the labyrinth of bureaucracy. Even with their help, she hasn't been able to find our why her son is dead.

Last fall, after all of her efforts failed, she did what a lot of people do when they fight the government and lose: She called the newspaper for help. I took up her search.

By then, Mrs. Day had collected a boxful of material about her son's case; his Navy medical records, his two autopsies, the report of a Navy investigation, Chuck's letters home and letters his Navy buddies wrote to her after he died. I combed these for clues. With Mrs. Day's help, I tracked down two of Chuck's Navy buddies, including a roomate. Seven civilian doctors agreed to review Chuck's medical history for me and discuss their findings.

Although they don't agree on the cause of Chuck Day's death, most of these doctors believe that the medical care he received in the Navy was inadequate, if not downright negligent. The Navy gave Seaman Day so few tests when he was sick that most doctors who reviewed his case said there wasn't enough information to positively determine the cause of his death.

If Chuck Day had been a civilian who died under the same troubling circumstances, his mother's efforts—and mine for that matter—wouldn't have been necessary. His parents, who believe the Navy killed their son by neglecting his health, would have been free to sue for his death. But the Days are powerless because of a 30-year-old Supreme Court ruling which denies active-duty servicemen and their families the right to sue the government for damages. The only way the Days can take thier case to court is if Congress passes a private bill, now pending which would permit them to sue the Navy for their son's "wrongful death."

On April 14, Senator Claiborne Pell, who says the Navy has never satisfactorily explained Chuck Day's death, plans to present the Days' case at a Senate hearing called to explore the ban against suits by members of the armed forces. The Senate subcommittee which scheduled the hearing is the same one which must approve the private bill Pell and Senator John Chafee introduced on the Days' behalf. (Representative Claudine Schneider recently introduced a similar bill in the House.) To date, the subcommittee has accepted the Navy's version of Seaman Day's death, one which absolves the Navy of any responsibility.

As things stand now, it may take an act of Congress to find out what Chuck Day did in the Navy, let alone what killed him.

A month after her son died, Mrs. Day asked the Navy for his personnel records. She knew the Navy trained her son as an electronics technician and that he worked in microwave communications at a NATO base in Naples, Italy, for eight months before he died. She knew that some scientists believe microwave radiation poses a health hazard, so she tried to find out more about her son's job in Naples. She ran into a stone wall and now charges that the Navy, fearful of lawsuits for microwave injuries, is covering up information about her son's work in the Navy.

"I cannot get any information on paper on what he did in the service," she complained. "What was my son doing? Did he, in fact, work with microwave equipment? Could he have been exposed to microwave radiation? Could this have made him sick? This is what I want to know, and the Navy won't tell me."

Eventually, I got answers to some of her questions, mostly from sources outside the Navy. The Navy doesn't want to talk about Chuck Day's death.

Several theories have been offered to explain Chuck Day's death, and each one has something to recommend it.

The Navy's explanation is that he had a severely diseased heart, a condition no one knew about, which caused a fatal cardiac arrythmia, or irregular heartbeat, which killed him without warning. One civilian doctor—a prominent Rhode Island cardiologist—agrees with that theory, although for him "it's an uncomfortable guess."

In the six months before he died, Chuck Day was plagued by persistent vomiting and weight loss. Navy doctors—and two civilian physicians I consulted—think psychological problems were the cause of those symptoms. The Navy and one civilian physician thought Chuck might have had anorexia nervosa, an hysterical condition usually found in weight-conscious young women who have an aversion to food, become emaciated and sometimes die if the condition isn't identified and treated. The Navy does not feel that psychological problems caused his death, however.

From the start, Chuck Day's parents believed their son's death had three causes: malnutrition, malpractice and microwave radiation. They are not alone in their belief that the Navy failed their son when he needed help most.

Dr. William Q. Sturner, Rhode Island's chief medical examiner, blames Chuck Day's death on malnutrition, dehydration and cardiac arrythmia. Medical neglect by the Navy, Sturner says, "contributed to all that."

The Navy denies that microwave radiation could have had anything to do with Chuck Day's mysterious illness and death. But three civilian doctors who are knowledgeable about the biological effects of microwaves disagree. In their view, most, if not all, of Chuck's symptoms could have been caused by his occupational exposure to microwave radiation in the Navy.

Microwaves—which emerged during World War II as the force behind radar and today have countless military, industrial, commercial and home uses—are at the center of a scientific controversy over their potential hazards as a source of electrical pollution.

The modern way of life—and much of the military's sophisticated weapons and communications systems—depends on these tiny high-frequency electromagnetic waves. But the same microwaves which conveniently transmit our telephone calls and television shows, help air controllers guide planes to safe landings and roast peanuts and coffee beans for the food industry, have a hazardous side too.

At high levels, microwave radiation can produce heat capable of damaging living tissue. In animal experiments, these levels have caused cataracts in adults and genetic defects in unborn infants. While scientists agree that these heating levels can be hazardous to humans, there is a continuing debate over the health effects of lower levels emitted by common electrical devices such as broadcast transmitters and radar antennas and high-voltage lines.

Whatever their position, most scientists agree that we really don't know enough about the effects of microwaves on human beings and that further research is crucial.

What is known is that Russian and other Eastern European scientists, who have studied the biological effects of microwaves far longer than Western scientists—and a small number of American scientists who have duplicated the Russians' experiments—believe they are hazardous. Not just the intense levels which roast a turkey in a microwave oven, but low levels as well. Sustained exposure to low-level microwaves, they suspect, might lead to all sorts of physical and mental problems: cancer, birth defects, heart trouble, cataracts, dizziness, fatigue, sterility, weight loss, stomach and behavioral disorders.

Whether Chuck Day died as a result of microwave radiation has yet to be proven. But the doctors who believe that is a strong possibility say that the Navy has yet to disprove it—and that, in fact, the Navy dismissed the possibility without ever really looking.

On July 4, 1978—the last day of Chuck Day's life—he and his parents walked out of a cinema in downtown Philadelphia. They blended easily with the holiday crowds thronging Broad Street that afternoon, a middle-aged couple and their skinny, teenage son in blue jeans.

On their way to an Italian restaurant for dinner, the Days were half a block from the theatre when Chuck pointed at a large dish-shaped antenna atop a nearby building.

"Ma, see that tower up there," his mother recalls him saying. "In February, I installed one. That's what they use for microwave communications."

"Chuckie, isn't that dangerous?" Mrs. Day remembers asking.

Her son laughed. "Ma, you know I always was a monkey. Remember the tree house I built? Every time I went up there your heart was in your shoes."

"Yeah, but what about microwave, Chuckie?"

"Ma, as long as you know the dangers, you're all right," her son said. "Microwaves are the latest thing. Without microwaves, the communications in our country would be nil."

Chuck talked on—about voltage and other details his mother didn't understand and today doesn't remember. But the vision of her son pointing up at the sky has never left her. Neither has the question which she kept to herself that day.

"Oh, my God! Could that be what made him sick?"

When the Days had last seen their son—in September, 1977, when he left for Naples—he was a different Chuck, pudgy around the middle and chubby-cheeked. The son they found in Philadelphia that summer was "a skeleton of a boy with a yellow tinge to his skin," his mother says. He had lost more than 50 pounds.

To less biased eyes, Chuck did not resemble a skeleton. If he were overweight before he went overseas, Chuck, who stood 5'10" tall, was slender now, with the gaunt look of a long-distance runner. His complexion may have looked jaundiced to his mother. To others, Chuck might have just been losing a great tan.

A great tan. That's what Petty Officer Emmitt Allison thought just three weeks earlier when he met Chuck Day for the first time in Naples.

That was on June 12, 1978, Allison's first day at the NATO base. Chuck was assigned to show the newcomer around.

Coming off 30 days leave in Scandinavia, where he spent long days basking in the sun, Allison recalls feeling almost affronted by the deepness of Chuck's tan, although he was encouraged by it too. A seaman with a tan generally means a duty station with plenty of liberty time. And this guy Day was obviously taking advantage.

He didn't find out Chuck was even sick until a day or so later. The two sailors were walking out of the Flamingo Club on base after lunch at the snack bar. The club's name is fancier than the pizza, burgers and BLT's it serves, but Allison remembers Chuck cleaning up his plate. Outside afterwards, they hadn't gone far when Chuck said, "Wait a minute."

He walked about three steps off the tree-lined path onto the grass beyond and leaned over, Allison recalls. Resting his hands on his knees for support, Chuck Day began to vomit his barely digested lunch onto the ground. "Hey, what's the matter? Are you sick?" Allison asked.

Chuck seemed embarrassed.

"It always happens to me," he shrugged.

About four or five days later, Chuck told Allison a little more about his ailment. "He said he had not been able to hold anything down for quite some time," Allison told me recently. "It was usually like 20 to 30 minutes after he had eaten that he threw up. He told me that he had lost of lot of weight since that had started happening . . . I told him, 'That sounds like a blockage: You ought to go to medical and get that checked out thoroughly.' He said, 'Well, I've been up there, and they said they checked me out, and they sent me to the shrink, saying it was all psychological, all in my head.'"

It was about three weeks later, around the beginning of July, when Allison heard the news.

He was sitting in his room after work when a seaman from the Navy personnel office stuck his head in the door.

"Have you heard about Chuck?" he asked.

"No," Allison answered. "What?"

"He's dead."

Charles E. Day Jr. was 17 when he enlisted in the Navy in November, 1976. He passed an induction physical and began basic training at the Great Lakes Training Center, 50 miles north of Chicago.

Twice during boot camp in January on February, 1977—Seaman Day showed up at sick call complaining about vomiting. On both occasions, the vomiting was accompanied by cold symptoms, and Chuck was given cold medicine by the corpsmen who treated him. He did not see a doctor either time. The corpsman who saw him the second time told Chuck he was coughing too hard, which was causing him to vomit.

Doctors I consulted say there's nothing unusual about that diagnosis. "You'll see it in kids with whooping cough," one physician told me.

After Chuck was dead and his family began asking questions, the Navy interpreted these episodes as part of a pattern they said led to his death. At the time, however, the Navy certainly didn't see anything unusual, or serious, about them. And the fact is, Chuck spent seven more months at Great Lakes without ever complaining of vomiting again.

Another incident at boot camp would also figure later in the Navy's explanation of what happened to Seaman Day, although, again, no one seemed very concerned about it at the time.

This was in April, 1977. Prodded by a chaplain, Chuck told a corpsman that he was depressed and has thought of killing himself. His mother says Chuck was depressed because the electronics training the Navy promised him had not come through yet. Nonetheless, the self-portrait that emerges from notes the corpsman took during the conversation is that of a shy loner, a teenager unhappy at home who joined the Navy to get away and didn't find the solution there either. The corpsman's response was to encourage Chuck to "read books on improving personality" and to come back if the feelings became extreme.

At the time, Chuck's depression and suicidal impulses didn't seem to bother anyone in the Navy. He was never referred to a psychiatrist, and three months later he was judged physically qualified for transfer to Naples, Italy. He arrived there in September, 1977. On June 27, 1978, he left Naples—this time aboard a hospital plane.

The Navy's assessment of his fitness for duty had changed dramatically in nine months.

"This man's fitness for duty is only marginal, since he is unable to work with high-voltage equipment because of periodic dizzy spells," his medical record said now. "He is now vomiting one to two times a day, feels constantly tired and is unable to get proper nighttime sleep." Since his arrival in Naples, he had lost almost 50 pounds.

The diagnosis at that time was "psycho-physiologic gastrointestinal reaction." Unofficially, the Navy gave Seaman Day a simpler explanation for his sickness. They told him it was all in his head.

Like many teenage recruits away from home for the first time, Chuck Day's first months in the Navy were rocky. But after just a few months in Naples, he began to show signs of adjusting to his new life. He used his free time to take correspondence courses in electronics and passed with high marks. His Navy evaluations, below average in boot camp, rose to top grades. He began to date.

Some time that first winter in Naples, Chuck told friends he had gone on a diet.

"I weighed myself at the gym. I've been working out to get in shape for softball. I'm down from 190 to 172. That tells you how great the food is here," he wrote to a friend in January.

Chuck hated the food in Naples so much that he and his roommate chipped in for a refrigerator for their room. Chuck kept it stocked with sandwich fixings. He was the kind of teenager, his mother says, who could eat a foot-long grinder and half an hour later ask, "What's for dinner, Ma?" That's why it was so puzzling when he began to vomit in February, four months after he arrived in Naples.

He wasn't talking about it—but his barracks mates couldn't help but notice that Chuck threw up after eating and was losing weight rapidly. They began to worry.

"At one point, a few of us in the room were saying, 'Look, you've got to go to the doctor . . . This is not normal'," his roommate, Joe Marx, recalled.

Chuck resisted, even when his NATO boss ordered him to the hospital for a checkup. Navy doctors would later interpret his attitude as indifference and wonder if Chuck were trying to conceal his vomiting, which is a symptom of anorexia nervosa. Chuck's friends give another explanation.

"I knew he was nervous about going to the hospital," says Marx. "I think he was afraid that there was something really wrong and he didn't want to know."

"He was afraid to go for the fact he might jeopardize his Navy career," Michael Smith, an Air Force sergeant who worked with Chuck, wrote Chuck's mother after his death.

It wasn't until May, 1978, after Chuck had begun to get dizzy at work, that the American Army sergeant who was his boss in the microwave communications tunnel where he worked ordered him to report to sick call at the Navy hospital in Naples. This time he went.

On May 12, Chuck told a nurse who examined him that the sporadic vomiting which began in basic training had reappeared in February, when he began throwing up once a week. But now, he said, he was vomiting after almost every meal and was down to 151 pounds.

Blood and urine specimens were tested and X-rays were taken of his stomach to rule out a blockage, such as a tumor. The tests came back normal, the Navy says, Chuck was given medicine to control the vomiting and told to return in 24 hours. He did not see a doctor.

It was four days before he reappeared, again on orders from his boss. This time, a physician's assistant saw him and decided, without ordering any further tests or referring Chuck to a doctor, that Seaman Day's problem was psychogenic. He was given a different medicine and told to return if the symptoms persisted.

Nine days later, Chuck fainted in a barber's chair on base and was taken to a NATO dispensary, not the Navy hospital where he had been treated previously and where his problem had been diagnosed as psychological.

"This has happened before," the frightened young sailor told the corpsman who examined him and noted these symptoms: low blood pressure and slow pulse, irregular heartbeat. When the corpsman listened to Chuck's chest, he apparently heard something abnormal. He wrote "heart stenosis?" on Chuck's chart.

Stenosis refers to a narrowing of a vessel in the body. This was a prophetic discovery in light of autopsy findings that some of Chuck's coronary vessels were abnormally small. But it was ignored when Chuck was transferred that day from the dispensary to the Navy hospital in Naples. His symptoms had improved by then and he was released with an appointment to see a doctor. He was never given any type of heart test, not even a simple electrocardiogram.

A week later, the Navy doctor who looked him over was struck by two things: Chuck seemed to be indifferent to his health problems and, except for his vomiting and weight loss, "appeared in no acute distress." Chuck denied anything was worrying him, but the doctor was convinced that some emotional problem was behind Chuck's complaints. He ordered another set of stomach X-rays and sent Chuck to a psychologist for examination.

The psychologist agreed that the root of Chuck's problem was psychological and recommended he be sent home for further tests. On June 30, Chuck arrived at the Naval Regional Medical Center in Philadelphia and was admitted to Tower 16, the hospital's psychiatric ward.

During the next four days, Chuck continued to vomit regularly after meals.

When his parents arrived on July 3 to visit him, they were shocked to learn their son still hadn't been given any tests beyond a routine physical. (The doctor who performed that physical suspected Chuck was anorexic.) Chuck had told his parents about his irregular heartbeat after the fainting spell in May. Mrs. Day wanted the Navy to give her son a complete cardiological exam.

"The doctor," Mrs. Day says, "kept saying, 'People are on leave. We're short-staffed. It's the holiday weekend. Come July 5, he'll start getting all the tests.'"

In the meantime, Chuck had to participate in ward activities, like volleyball. Doctors let his parents take him out of the hospital and on the Fourth of July, Chuck and his parents spent the day sightseeing.

About 20 minutes after they left, Chuck approached a corpsman and told him he had thrown up. At 11:45 that night, Chuck approached the corpsman again and said he had thrown up once more. They chatted a bit and, the corpsman observed, the young seaman "seemed more at ease." While Chuck confided that "he felt he needed to be out of the Navy," he added that "if he should return to duty he would willingly fulfill his military obligations."

What happened in the night that followed is a mystery.

What is known is that a corpsman observed that Seaman Day "began snorting through his nose in rapid fashion" at about 5 a.m. "Patient appeared to be asleep and possibly having a bad dream," he wrote on Chuck's chart. "Otherwise patient slept well all night."

At 6:45 a.m. that "bad dream" turned out to be something much more serious. "Attempted to arouse patient," a different corpsman wrote at this time. "Discovered that he wasn't breathing. . . ."

For the next 25 minutes, an emergency cardiac arrest team tried to revive Chuck, but their efforts were futile. At 7:10 a.m. on July 5, 1978, 12 days after his 19th birthday, Seaman Charles E. Day Jr. was pronounced dead. His body, which now weighed 136 pounds, was discharged to the hospital's morgue for an autopsy. The discharge diagnosis, two Navy doctors wrote later, was: "Death, Cause Undetermined."

No one in the Navy expected Seaman Day to die. But then, no one in the Navy thought Seaman Day was sick, not physically anyway, and when he died, the Navy was hard-pressed to explain why.

"Every possible avenue has been explored in an effort to establish the exact cause of Charles' death," Vice Admiral Willard P. Arentzen, the Navy's Surgeon General, assured Charles and Mary Day in a November, 1978 letter. Their oldest son had been buried for three months by then, but the Navy still didn't know what killed him.

A Navy coroner did find some abnormalities during the autopsy performed several hours after Chuck died—fluid in the lungs, blood congesting Chuck's stomach, spleen, small bowel and adrenal glands, slight damage to nerve cells in his brain—but these were generally blamed on normal changes that occur during death. During this first autopsy, the only heart problem discovered was an abnormally small coronary artery, but this was said to be congenital. In any case, none of these problems, the coroner concluded, could explain Chuck's vomiting, weight loss and fainting or his sudden death.

"A complete autopsy was performed, but no evidence of disease or injury to any organs or tissue was found which would account for his death," the Surgeon General explained to Seaman Day's parents. "Chemical analyses were also conducted but failed to reveal any evidence of poisoning or any abnormalities of body fluids or tissues. . . . The immediate cause of his sudden demise remains undetermined."

The Navy dismissed the Days' suggestion that their son might have died from malnutrition or microwave exposure.

"Indications of these maladies were not present in the postmortem findings," Admiral Arentzen said.

Although the Navy didn't know why Chuck died, it stood by its explanation for his illness, although Arentzen admitted that psycho-physiologic reactions "do not normally cause death."

Another month passed before the Navy came up with an explanation for the Days, this one furnished by military pathologists at the Armed Forces Institute of Pathology in Washington, D.C.

After reviewing Seaman Day's autopsy materials, the institute decided that the cause of death was a "probable fatal arrythmia," or irregular heart rhythm.

In the final analysis, everyone dies from an irregular heartbeat—one that stops. In Chuck Day's case, however, the military experts said, the arrythmia was caused by two serious heart defects which no one knew he had, not even the Navy coroner who examined his heart under a microscope as part of the first autopsy and noticed only the congenitally small artery.

On reexamination, the experts in Washington found that the small vessels of Chuck's heart were also abnormally narrow. This condition, the Navy says, hampers the free passage of blood into the heart muscle and can produce a fatally irregular heartbeat. The inner surface of the heart also showed some thickening, a condition called endocardial fibroelastosis.

Although Doctor Albert S. Most, chief of the cardiology unit at Rhode Island Hospital, agreed the narrow heart vessels could have caused the death, he had problems with the theory. Patients with a disease of the heart's small vessels often complain of chest pain, but Chuck never did.

Chuck's death "might have been due to this small vessel disease in his heart," Dr. Most said. "I don't have anything else to hang on." But, he said, "It's really an uncomfortable guess."

The second condition—the thickening of the inner heart surface—"seems unlikely" to have been a major contributing factor in his death, Dr. Most said.

Both conditions are extremely rare, and medical authorities don't really know what causes them.

"It's hard to understand how he could have both rare things," Dr. Most said. "It's like being hit by lightning twice in the same day."

There were two reasons for this diagnosis, according to the Navy's own investigation: "his apparent indifference to his own complaints and the normal physical findings and X-rays." Where Navy medical officials saw indifference, however, Chuck's friends saw fear and bewilderment, normal reactions in a teenager who is sick and doesn't know why.

Before Chuck died, the Navy was convinced his problems were psychological. The former Navy psychiatrist I consulted about Chuck's case agrees with the Navy that emotional problems were sufficient to explain Chuck's vomiting and weight loss and, this doctor adds, even his death. He pointed to Chuck's boot camp depression and suicide threat and the description of an unhappy childhood Chuck gave the Navy psychologist as evidence to support the Navy's argument that Seaman Day was a young man with significant emotional problems. The "chronic stress" of these problems could have caused Chuck's vomiting, he said.

Only one civilian doctor I consulted, a specialist in gastrointestinal disorders, believes Chuck was suffering from anorexia nervosa, as the Navy doctor in Philadelphia suspected. Most other doctors I spoke with discount that theory. They note that the condition is rarely found in males and say that Chuck showed no signs of aversion to food.

There is one diagnosis which the Navy has never really fully investigated though, and that is whether Chuck was "zapped," that is, exposed to microwave radiation which made him sick.

In April, 1979, after Mrs. Day wrote Rosalyn Carter in the White House about her son's case, the Navy finally got around to ordering an official investigation into the death of Seaman Day. Rear Admiral Melvin Museles spent two weeks reviewing Chuck's medical records, but because of "time and distance constraints" never interviewed anyone in Naples or Philadelphia about the case. The admiral wasn't able to consider whether microwaves had anything to do with Chuck Day's illness and death either because, his report said, Chuck's service record was "unavailable." (Neither Admiral Museles nor Surgeon General Arentzen would agree to be interviewed for this story.)

"There is no evidence presented in the record of any negligence in treatment," the Navy's investigation of itself concluded.

That record, however, shows that while in Naples, Seaman Day visited the Navy hospital five times as an outpatient. He spent five days as a patient in the Navy hospital in Philadelphia. During that time, his blood and urine were tested twice and his stomach X-rayed twice.

Civilian doctors I spoke with were amazed that those were the only tests given to a young man who had lost more than one-quarter of his body weight before he died.

The Navy is "just not being honest with themselves about the mistakes that they've made or the lack of proper medical care," Dr. Sturner says. "They had the chance to diagnose and treat this boy. They didn't do it."

Medical experts say it is impossible with the information that the Navy has supplied to determine whether or not Chuck died from the effects of his job. They need to know his work history, which the Navy has failed to supply despite repeated requests from Mrs. Day, Senator Pell and myself. In fact, the Navy did not even supply the information for its own investigation in 1979.

Chuck Day's buddies in Naples say he worked in the Microwave Section of the Alto Communications Facility at the NATO base, the official name for what appeared to be a Quonset hut buried in a hillside. "ACF" was how the phone was answered, but the technicians who worked there called it a different name: Tunnel 4. Inside, they maintained the coding equipment and microwave transmitters and receivers which kept Naples in constant touch with allied bases throughout Europe. Tunnel 4's mission was simple, according to Joseph Marx, Chuck's roommate who replaced him in the microwave section after Chuck was sent home: Keep the equipment operating. "They want you on the air," Joe Marx told me. "They don't like downtime."

"Downtime" was the enemy Seaman Day stood guard against in Tunnel 4. He worked a 24-hour watch-standing shift in the microwave section—7:30 a.m. to 7:30 a.m. By day, senior technicians were in charge. At night, the watchstander was alone with the equipment, making sure it was transmitting on the right frequency, performing routine maintenace or minor repairs when necessary.

"We all kind of envied him," Marx says. "One day on and three days off. I don't ever remember him complaining."

Could Chuck Day have been exposed to microwave radiation in Naples?

"He was in the room where the microwave generating equipment was," says Emmitt Allison, who also worked in Tunnel 4. "The opportunity was there for exposure, definitely, and all it would take would be an accident or a moment of forgetfulness.

"There are always safety precautions, and if they're followed, then he shouldn't have been," Allison said. But "a lot of times when you have a young seaman on watch . . . they can do things that perhaps they have been told not to do or have been told and have forgotten and they do them . . . . He could have done something that would have exposed him (or) somebody else might have left something, a loose connection or whatever, for microwave radiation to be escaping into the air."

Chuck's only complaint about his job, says Marx, was that he wasn't busy enough. So he must have been grateful for the break in routine that came in February when he helped install the new microwave antenna on the tower outside Tunnel 4, the job he told his parents about the day before his death. (The Navy acknowledges that he worked in Tunnel 4, but denies that Seaman Day was involved in that antenna installation.)

The output of that antenna, Allison recalls, was 200 kilowatts, strong enough, says one microwave expert, to ignite a pile of steel wool a couple of hundred yards away.

If Chuck Day "was standing anywhere within 100 yards of that where he was being irradiated, it was dangerous to his health," says Dr. John T. McLaughlin, a surgeon in Glendale, Calif., with extensive experience treating microwave workers.

In 1954, Dr. McLaughlin treated a radar repairman for the Hughes Aircraft Company who made the mistake of standing directly in the beam of a radar transmitter, within ten feet of the antenna.

"In a few seconds, he had a sensation of heat in the abdomen," Dr. McLaughlin said in a medical journal report. "The heat became intolerable in less than a minute and he moved away from the antenna. Within 30 minutes, he had acute abdominal pain and vomited."

During emergency surgery, Dr. McLaughlin could see that the man's intestines were inflamed and that his small bowel was "beefy in color"—as if it had been cooked. Eleven days later, the man died. Dr. McLaughlin's diagnosis: tissue destruction and death from microwave radiation.

Dr. McLaughlin's report was not well received. Two months after it appeared in California Medicine in May, 1957, the Armed Forces Institute of Pathology, the same outfit which investigated Chuck Day's death, discounted Dr. McLaughlin's findings. In a memorandum, the institute argued that the case had too many "complicating factors" and "is not an acceptable instance of intestinal damage due to radar."

Twenty years later, that remains the federal government's official position. A month after Chuck Day died, the Navy pathologist who had autopsied Chuck's body the day he died asked an official in the Federal Bureau of Radiological Health if she knew of any cases of fatal intestinal damage caused by radar.

The official responded by sending the pathologist a copy of Dr. McLaughlin's report, along with the 21-year-old memo disputing it and a letter which said: "We are not aware of any established cases of fatal intestinal damage due to radar."

To Dr. McLaughlin, it seems the Navy is trying to cover something up about Chuck Day's case. "They don't give you any information at all," he said. In Day's first autopsy report, however, Dr. McLaughlin spotted something which he believes could be "the very key to this guy's case." Chuck Day's autopsy showed that his adrenal glands were congested with blood. These tiny glands, which perch on top of each kidney, aren't much bigger than a fingertip, but it would take acres of chemical plant to synthesize the more than 50 hormones or hormone-like substances they manufacture. They are essential to life. Remove them and death would follow in a day or so. Slow down their work and a person would become weak and debilitated, a shell of his former self.

"His medical history to me looks like a typical case of Addison's disease," Dr. McLaughlin said.

Addison's disease or adrenal cortical insufficiency, occurs when the adrenals begin to waste away and stop producing their vital hormones. Several things can cause the disease, including various infections, heat stroke—and, Dr. McLaughlin says, microwave radiation.

"The adrenals are very sensitive to changes in temperature," says Dr. McLaughlin, who adds: "I have seen two cases of it (Addison's disease) caused by microwaves . . . ." Both cases involved men who worked with microwave equipment. "Fortunately, we made the diagnosis and they survived, but they survive on cortisone because their adrenal glands are no longer functioning."

Other physicians consulted about the case doubted Dr. McLaughlin's hypothesis, noting that while Chuck's adrenals were congested, they did not show signs of atrophy.

What is undeniable are Chuck Day's symptoms which are consistent with the textbook definition of Addison's disease: weakness, weight loss, low blood pressure, gastrointestinal upsets and a brownish pigmentation of the skin, which often makes sufferers of the disease seem to have tans.

The Navy had maintained, while he was alive, that Chuck's problems were all in his head. They may have been right, though not for the reasons doctors thought.

By attaching electrodes to the skulls of cats, Dr. Allan Frey, an American biophysicist, has demonstrated that the brain is highly sensitive to microwaves, not only extreme levels, but at levels 350 times lower than the U.S. safety standard.

Other studies, by Russian scientists mostly, have linked virtually all of Chuck's symptoms before he died—low blood pressure, gastrointestinal upsets, slow pulse, dizziness, weight loss, headaches—to exposure to microwaves at levels below the U.S. safety standard.

Scientists are not sure how microwaves cause these problems, but one theory is that they alter natural biological rhythms by interfering with the natural electrical impulses transmitted through the central nervous system. Experiments with rats have shown that microwaves trigger the stress-response mechanism.

"Electromagnetic fields destroy the information system of the organism," explained Dr. Karel Marha. Dr. Marha is one of the leading Eastern European experts on the biological effects of microwave radiation. A Czechoslovakian scientist who now works as a health physicist for a Canadian utility, Dr. Marha also agreed to review Chuck Day's medical record.

"The brain works more or less as a computer and to get information from outside and inside and say what to do for every part of the body . . . ," Dr. Marha said. "Pulsed electromagnetic fields work as noise for this information system so the brain doesn't know what's happened and doesn't know what to say to the organism what to do now or in the future."

Dr. Marha said some of Day's symptoms could have been caused by microwaves, but he was unable to give an opinion on the cause of his death because the information available from Day's Navy medical records was so incomplete. He couldn't believe that Chuck Day was never given an electrocardiogram or a brain wave test "because by such a complaint it should be done."

Chuck Day's health problems "fit in with the pattern of microwave sickness," said Dr. Milton Zaret, a Scarsdale, N.Y. ophthalmologist, who began studying the biological effects of microwaves for the military in 1959 and is now one of the leading critics of our government's microwave policies.

Microwave sickness was recognized more than a decade ago by Soviet doctors, who identified it after studying thousands of workers who had been exposed to microwaves and complained of many of the problems Chuck Day reported in Naples.

"Everything he had could have been caused by microwave radiation. . . . There's nothing else that stands out," says Dr. Zaret, who reviewed Chuck's medical history and autopsy reports.

"You have evidence in his heart; you have evidence in his brain structure, of a pathology that is producible in animals by exposure to microwave radiation. . . . When you come down to it, everything that the young man had points in this direction and doesn't point in any other direction."

The Navy "didn't even try to rule that out," Dr. Zaret says. "They didn't investigate it at all."

The Navy's investigation of Seaman Day's death, says Dr. Zaret, "was a coverup, it was a whitewash, it wasn't a real investigations. There wasn't any real attempt to go into what Seaman Day's real environmental exposures could have been. They just went through a charade because a senator asked them, and they figured they could snow the senator.

"The military is the biggest user of radio waves and microwaves in the world," Dr. Zaret says. "They must use these radiations to make all of the sophisticated weapons systems work. None of us are against their having these systems, but some of us are against their not taking the proper precautions and then trying to cover it up."

To find out if Chuck Day's health was damaged by microwaves, Dr. Zaret and other microwave experts say the Navy must provide information about the type of microwave equipment in Tunnel 4. Even the Navy admits this.

Early this month, when I asked if microwaves could have made Seaman Day sick and die, a Navy spokesman told me that Navy medical officials could not give a "definite answer . . . without knowledge of the exact equipment" he worked around.

But when I asked about that equipment, the spokesman said, "that information is classified under NATO classification."

I spent more than three months this winter looking for Chuck Day's killer. I didn't solve the mystery. I did turn up clues, several of which point at a likely suspect. But no one—not me, not Chuck Day's family, not Senator Pell—has the whole truth. There are just pieces of a puzzle. It does seem clear, though, that Chuck Day might be alive today if the Navy had taken better care of him. It seems clear that microwaves could have made him sick, even clearer that the Navy never really investigated whether it was a possibility. Like the larger question raised by his death—Could microwaves be hurting all of us?—the cause of his death is a mystery whose solution only time may reveal. But the history of medicine is full of stories about substances that were not recognized as harmful until it was too late for many victims.

"We had a whole industry of people painting radium dials on watches," Dr. Most said. "They thought that was okay to do that, and I'm sure when the first guy said, 'Hey, that's bad for you,' they said forget it, and they got cancer of the tongue and all kinds of terrible diseases.

"It's not uncommon for ignorance to breed disdain early on," Dr. Most said. "Then people come around and all of a sudden it becomes common knowledge. Everybody knows about it. You forget about those few generations that were wasted because we didn't take the time to listen."

For the last three years, Chuck Day's mother has been trying to get people to listen. Next month, she hopes to travel to Washington to tell the Senate subcommittee her story—and to present a petition calling for an investigation of malpractice in the military health care system. More than a thousand people have signed the petition since she began circulating copies last fall.

Maybe the Senate committee will decide that her son's case is worth investigating. And maybe the committee will be able to get the answers she wants. And maybe one day she and the rest of her family will know once and for all why Chuck didn't come home.

And maybe not.

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[From the Providence Journal-Bulletin]

## THE SYMPTOMS ARE ALL TOO FAMILIAR

(By Christopher Scanlon)

When I described Chuck Day's symptoms to Richard Raivio, the first words out of his mouth were: "They sound absolutely familiar."

In 1968, Raivio, then a private in the Army Signal Corps stationed in Germany, was tranferred to a microwave relay station atop a mountain in Bavaria. Raivio had been trained as a telegrapher, but he was given a different job at his new post—as a "tower monkey."

His job was to climb the station's three towers once or twice a month for routine maintenance—changing light bulbs and knocking off ice that formed on the antennas.

For the next 16 months, according to affidavits from his Army supervisor and co-workers, Raivio was regularly exposed to massive doses of microwave radiation from the antennas which continued to transmit while he was on the towers. Chuck Day's symptoms sound familiar to him because he had them too.

"A lot of times when I had a meal and went up on those towers," he says, "I'd vomit the meal right up immediately. But if I went up on an empty stomach, then maybe a hour later it would hit me. Even to this day I have a very, very light, touchy stomach."

Raivio blames a litany of other problems on his exposure to microwaves: psoriasis, high blood pressure, skin tumors on his arms and legs, mental problems. Mental health professionals, including a psychiatrist, have diagnosed him as a paranoid schizophrenic. The Veterans Administration claims his problems have nothing to do with microwaves. The VA says Raivio has a history of addiction to alcohol and drugs. Nonetheless, a VA appeals board earlier this year awarded Raivio partial disability for his mental problems.

Raivio, now 33, lives with his parents in Berkley, Mich., a Detroit suburb. He hasn't had a job since 1970.

Raivio is not alone, he says, but is just one of an unknown number of Americans who are suffering the harmful effects of microwave radiation and are fighting to force the government to acknowledge the dangers of microwaves.

There's a lot of us running around," he says, "but what's bad is that there's one here in Michigan and one in St. Louis and another one out in California, and the congressmen, they can't focus on just one guy. But if we all got together, it would be one heck of a group, all kinds of problems."

Besides Raivio, that group would include:

Thomas Montgomery of Groton, Conn., a civilian radar repairman who was exposed to intense microwave radiation in 1949 while working for the Army Signal Corps. A colleague, unaware that Montgomery was on the roof of a mobile radar van they were testing, turned the power back on. Today, Montgomery is totally blind and deaf.

Robert Engell, a former Rhode Islander living in Ellington, Conn. For 12 years, until 1973, he worked for the Navy at Quonset Point as an electronics technician, overhauling and repairing navigation equipment which emitted microwave radiation. Today, he is seriously ill with cancer of the pancreas which he blames on microwaves in a lawsuit pending against the equipment's manufacturers.

Ronald P. Karras of Skokie, Ill., who blames his deafness, impotence, bleeding from the eyes and diabetes on his 13 years of exposure to microwaves as a radar repairman at Nike missile sites. Last January, the General Electric Corporation and Western Electric Company, makers of the radar sets, awarded him $200,000 to settle a suit he filed against them for damages.

Joseph Towne of North Highlands, Calif. From 1957 until 1966, Towne was a radar technician aboard an Air Force EC-121 Constellation. Microwaves caused the cataracts diagnosed in both eyes in 1968 and his heart trouble, he says.

Towne says he could add "about 250" other names to this list, ex-servicemen and civilians who belong to the Radar Victims Network which the founded in 1972.

There are others that could be added to the group—Donald Cadieux and Samuel Yannon, for example—if they were still alive.

Cadieux, an electronics technician from Pawtucket, was Robert Engell's benchmate at the Quonset Point Naval Air Rework Facility. He died in 1974 of cancer of the pancreas. He was 31.

Last February, Yannon became the first documented case of a man killed by microwave radiation when the Workers' Compensation Board of New York upheld a ruling that he died of overexposure to microwaves.

Yannon spent 15 years tuning microwave relay equipment atop the Empire State Building for the New York Telephone Company. When he died in 1974 at 62, he had lost almost all sight, memory, speech and motor coordination. His weight had dropped from 160 to 70 pounds.

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[From Newsweek, July 17, 1978]

## THE FLAP OVER THE ZAP

New television transmitters in the cities, spreading power lines in the countryside, more radar stations to monitor air traffic, innovative consumer products like microwave ovens and CB radios—Americans are living through an enormous proliferation of electrical technology, Each of these devices offers obvious benefits, but each also generates an invisible and quite possibly insidious form of pollution—electromagnetic radiation. Many experts regard the concentration of such "electrical smog" in the atmosphere as far too weak to seriously affect humans. But recently a vociferous band of scientists and environmentalists has charged that repeated low doses of radio-frequency and microwave radiation can produce all manner of maladies—from disorientation and decreased fertility to cataracts and cancer.

One early hint of trouble came in 1976 with the disclosure that the Russians were aiming microwave beams at the U.S. Embassy in Moscow, allegedly damaging the health of some of its personnel. Last year, writer Paul Brodeur of The New Yorker fanned the flames with his book "The Zapping of America." Brodeur claimed not only that electromagnetic radiation was harming humans, but that the U.S. military and the electronics and communications industries were involved in a massive coverup of the danger. Then, last March, a report by Congress's General Accounting Office concluded that "everyone is exposed continuously to [radio-frequency and microwave] radiation . . . [which] has become a national concern because of the rapid increases in its use and its potential harm to public health."

Other government experts dismiss such language as overblown. They concede that too little is known about the effects of long-term exposure to low levels of the radiation, but flatly deny that the population faces an imminent risk. "This is not a crisis now," asserts Janet Healer of the National Telecommunications and Information Administration. "We need to know more about it, but we are not bathed in seas of dangerous radiation."

### RISKY RADAR?

Nevertheless, local groups have begun vehemently resisting moves that are likely to increase electrical pollution. Citizens of Portland, Ore., which was cited by the Environmental Protection Agency in 1974 as the most livable big city in America, were aghast at a recent EPA report showing their community's concentration of microwaves to be the highest of twelve metropolitan areas. The Oregonians promptly organized a protest against a planned new television station, whose transmitter would add to the electromagnetic blizzard, and prevented its construction. Across the continent, a coalition of Cape Cod residents has launched a legal drive against a new Air Force radar station known by the acronym PAVE PAWS (for Precision Acquisition of Vehicle Entry Phased Array Warning System). Their argument: PAVE PAWS will create dangerous concentrations of radiation along local roads, almost twice as high as that beamed at the U.S. Moscow embassy. The Air Force, however, denies that the station represents any health risk.

What is indisputable is that the amount of electromagnetic radiation is steadily multiplying. In the U.S., there are more than 35 million electromagnetic devices for such industrial sues as curing plywood, heat-sealing plastics and processing food. There are 9 million broadcasting transmitters, hundreds of thousands of microwave communication towers, tens of thousands of radar dishes and more than 40,000 miles of overhead high-voltage lines. The number of microwave ovens in the U.S. has soared from 50,000 in 1970 to more than 6 million today, while the number of CB radios in use is now close to 30 million. "If you had looked back from space to see the microwave radiation from earth in 1900, the planet would have looked dark," says biophysicist Allan Frey of the Randomline research firm in Huntingdon Valley, Pa. "But if you could look back today, you'd see it glowing like the devil. The stuff is all around us."

### HOW HARMFUL?

The crucial question is whether the "stuff" around us really causes any serious harm. This radiation has nowhere near the lethal power of radioactivity, which can kill living tissue by chemically transforming it. Research in the 1950s and '60s indicated that electromagnetic radiation damages tissue by heating it up—just as it cooks food in microwave ovens. The official safety standard for exposure to radiofrequency and microwave radiation was set in 1957 at 10 milliwatts per square centimeter, a figure that was one-tenth of the lowest concentration known to cause damage by heating. Even today, few people are subjected to anywhere near that amount of radiation. According to an EPA survey, more than 98 per cent of the population is exposed to less than one ten-thousandth of the safety level.

The critics, however, maintain that the basic assumptions of the standard-setters were wrong to begin with. They point to growing evidence that the radiation can cause effects quite apart from those attributable to heating alone—even at exposures well below the safety standard. Some of the evidence:

The numbers of cancer cases and fatal heart attacks in North Karelia, a desolate region of Finland, increased dramatically after World War II when a large radar station went into operation just across the nearby Soviet border.

Scientists in the U.S.S.R. and Eastern Europe have reported that quite low levels of radiation can cause headaches, irritability, loss of memory and appetite. The Soviet limit for exposure to radio-frequency and microwave radiation is one-thousandth of the U.S. standard.

An experiment exposing animal cells to microwaves produced chromosomal damage. Embryos subjected to the radiation displayed brain abnormalities and deformed spinal cords. Other animal experiments suggest that such radiation makes it easier for foreign substances in the blood to pass into the brain.

A series of studies by Andrew Marino of the Veterans Administration Hospital in Syracuse, N.Y., indicated potential problems from high-voltage power lines. "Right under the wire, there is stunting of growth," reports Marino. "In intermediate fields, about 300 to 500 feet away, there are physiological effects like changes in blood chemistry and in the electrocardiogram. At 1,000 feet away, there are behavioral effects—drops in human reaction time, for instance."

The interpretations of such experiments, however, have become a source of controversy. Solomon M. Michaelson of the University of Rochester refuses to give any ground to critics of the safety standard. "Nothing we see is different from the effects of heating on the body," argues Michaelson. "They can all be explained as physiological responses to heat. If there is enough heat in the body, say, you can get changes in heart function." Janet Healer cautions against too pessimistic a reading of the experiments' results. "Effects," she points out, "are not always hazards. Furthermore, if we could cut X-ray exposure by using microwaves, it might be very beneficial."

How valid is author Brodeur's claim that government and industry have consistently concealed evidence of the dangers of elecromagnetic radiation? According to the Veterans Administration's Marino, the primary evidence of a cover-up is that research proposals involving low levels of radiation almost never get funded. Other scientists are more skeptical. "I do not see a grand conspiracy," says Allan Frey. "The situation is just that scientists advising the government in the 1950s and 1960s made some wrong assumptions." Radiation expert Merril Eisenbud of New York University Medical Center charges only that "there has been some foot-dragging over the years. We're lucky that microwaves aren't more dangerous than they are, because very little work has been done on them."

### TALL BUILDINGS

Fortunately, that situation seems to be changing. Backed by about $8 million of annual government funding, more than 100 research projects are under way in the U.S. to investigate the effects of radio-frequency and microwave radiation on both animals and humans. Experts hope to study individuals subjected to high levels of the radiation, such as occupants of tall buildings directly in the paths of radio signals. There is also mounting pressure to reduce the limit for human exposure. In fact, that move seems quite likely even without a wide body of incontrovertible evidence that microwaves and similar forms of radiation are as dangerous as the environmentalists assert.

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[From the Congressional Record, Feb. 24, 1982]

## Health Care in the Armed Forces

Mr. Nunn. Mr. President, last December the Atlanta Constitution published a comprehensive three part series on health care in the Armed Forces. The series was written by Paul Lieberman and Jim Stewart.

The military health care system directly affects millions of Americans—active duty members of the armed services, families of service members, reservists in training, and retired military members and their dependents. For that reason, it is a vitally important subject to everyone concerned about the overall state of the Armed Forces.

The authors of the Atlanta Constitution series have provided an indepth look at military health care from a variety of viewpoints. They have examined the system from the perspective of military physicians, the patients who use military health facilities and services, and the services themselves. In so doing, they have identified several problem areas and raised important questions about the quality of the services provided. The issues raised by the writers deserve careful consideration from both the Congress and the leadership in the Department of Defense.

As part of their overall assessment of military health care, the authors looked into medical practices at the Wilford Hall Hospital at Lackland Air Force Base in Texas, which subsequently has received wide notice in the media. This series represents only a small portion of their reporting on the situation at Wilford Hall, about which the writers have published numerous articles over the past several months. The Wilford Hall case was first brought to the attention of the public by Mr. Lieberman and Mr. Stewart in reports printed in the Constitution, and the Department of the Air Force and the appropriate committees are currently investigating this matter.

Mr. President, this series represents exhaustive research and perceptive reporting. The writers have already established firm reputations as insightful and thorough journalists, and their reporting on military health care will contribute further to their professional stature. I recommend this series to all Senators and ask that the articles be printed in the RECORD.

The articles follow:

[From the Atlanta Constitution, Dec. 9, 1981]

## DOCTORS CRITICAL OF HEALTH CARE IN ARMED FORCES

(By Paul Lieberman and Jim Stewart)

Inferior health care is being delivered to America's 9 million servicemen and military dependents, according to physicians who have worked in both military and civilian medical practices in recent years.

A nationwide survey of physicians who have served as military doctors in the post-Vietnam era described a health-care system plagued by poor equipment and supervision and too many incompetent practitioners.

The physicians told of trying to mend broken bones without the simple screws needed for the job, of seeing medical colleagues refuse to come to the emergency room to tend to patients, and of a system that might assign a psychiatrist to decide what to do with accident victims.

The physicians, who completed a questionaire comparing their experiences in military and civilian medicine, overwhelmingly made one judgment: Given a choice, they would not want members of their own families treated in military health-care facilities.

Of 202 physicians who answered the questionnaire prepared by The Atlanta Constitution, only four said they would prefer that their own families be treated under the military health-care system.

The words of Dr. Philip Altus, an internist from Tampa, Fla., who served two years in the Air Force, coincide with the conclusions of many of those surveyed. "The military guarantees you care, but not quality care," he said. "I would hate to depend on them for my medical care."

The Constitution sent a two-page questionnaire to 300 physicians across the country who recently served in the Air Force, Army, or Navy. Two-thirds of the physicians responded. Most explained their evaluations in written comments or agreed to follow-up interviews.

Twelve questions asked them to compare aspects of military and civilian medicine, including the availability and condition of equipment, the quality of support personnel and fellow physicians, and work demand.

Many of the physicians praised selected features of the military health-care system. A majority reported that their workload was easier in the military than in civilian practice. Some said the relief from worry about patient fees and the reduced threat of malpractice suits in the military improved medical practice.

And while; many doctors predictably did not welcome military regimen—having to worry about the positioning of their belt buckles and the sparkle of their shoeshines—21 percent reported that life was more enjoyable in the military than in the civilian world.

When asked, however, to compare the overall quality of health care practiced in the armed services and civilian institutions, 56 percent of the physicians termed military health care "worse" or "much worse."

Only 6 percent evaluated military health care as better than health care in civilian society.

And other survey results detailed reasons for the critical assessment:

Sixty-nine percent said the availability of medical equipment was "worse" or "much worse" in the military. Only 6 percent found equipment more available in the military.

Sixty-three percent said equipment and facilities in the military were in worse condition than equipment and facilities in civilian medicine. Only five doctors (2.5 percent) said equipment was better maintained in the military.

Fifty-three percent evaluated the quality of supervision for physicians as inferior in the military. Only 13 percent rated the supervision as better.

Thirty-seven percent said they found more colleagues whom they would call "incompetent or dangerous" in the military than in civilian medical practice. Only 9 percent found fewer such doctors in the military.

## SOLVING A DESPERATE DOCTOR SHORTAGE

The bleak appraisal of military medicine was given at a time when the promise of free, high-quality medical care is one of the major inducements used to gain recruits for the country's all-volunteer armed services.

Polls of armed forces enlisted personnel show that they rate health care as second in importance, after salary. "it is a strong incentive for people (to join). It seems to be viewed as a high priority," said Dr. John H. Moxley III, who recently completed two years as assistant secretary of defense for health affairs.

Military health officials admit that serious problems have beset the system in recent years, many of the problems stemming from a severe shortage of military doctors following the abolition of the physician draft in 1973.

Lt. Gen. Charles Pixley, who recently completed four years as Army surgeon general, said the Army was "desperate" for physicians when he took office in 1977. Pixley said equipment shortages also were a fact of life in some hospitals and clinics.

But Pixley, like other military health-care officials, insisted that "great progress has been made" to increase the number of doctors and provide them with proper equipment. "I really believe," the three-star general said, "that if you were to go out make a survey today, those complaints . . . are certainly not prominent today."

Pixley added: "You don't encounter today the bitterness and hostility, the absolute bitterness that was so prevalent for nearly 25 years among some of our drafted doctors who resented being drafted, who felt their talents were not being utilized properly."

Many of the physicians included in The Constitution's survey were among the last of the drafted doctors. Their entry into the armed forces often was postponed past 1973 under the "Berry Plan," which allowed physicians to complete training in a medical speciality before reporting for active duty.

Many other physicians included in the survey, however, entered the armed forces under scholarship programs in which the military paid for, or provided, part of their medical training.

With civilian society offering far greater professional and personal freedom—and, usually, far greater income—it was not surprising that a majority of the physicians surveyed did not enjoy life in the military. More than 20 percent, in fact, termed military life "much less enjoyable" than civilian life.

Many seemingly fit the profile of the irreverent Army doctors of "M*A*S*H," never quite comfortable with the dual role of physician and military officer.

But even the minority of physicians who found military life "more enjoyable" or "much more enjoyable" were not impressed by the health care delivered to servicemen, military retirees and their dependents.

Only three of the physicians who preferred military life rated military health care as superior to civilian health care. Fifteen rated military health care as worse than civilian health care.

## FOR THE LACK OF A SIMPLE SCREW * * *

The survey identified the shortages of medical equipment and its poor condition when available as factors that often made the practice of medicine difficult in the armed services. "I and my peers were unable to deliver the quality of care we were trained to deliver," said Boston radiologist R. A. Novelline, who served to the Navy.

Dr. G. Lee Cross III, as orthopedic surgeon formerly stationed at an Army hospital in Korea, had to write his senator to get "screws to put the plates on the bones of boys who had busted themselves up."

Dr. Lawrence N. Reckles, another orthopedic surgeon, spoke of his very first operation to repair a broken hip after leaving the prestigious Mayo Clinic to become a Navy doctor in Orlando, Fla. With a 90-year-old woman on the operating table already under anesthesia, he asked for a nail to refasten the broken hip, expecting the nail to be in abundant supply in any orthopedic service.

"I turned to the (medical) corpsman and said, 'We need a 2¼-inch nail,' " Reckles recalled. "And he looked at me and said, 'That's too bad, because the shortest one we have is 3½ inches.' "

"That nail," Reckles said, "would have gone right up into the pelvis. It would have been malpractice."

Reckles said he had to get a nail from a civilian hospital, and the delay put the elderly patient's life in jeopardy. "In spite of us, she survived," he said.

Dr. W. L. Amos, an obstetrician, cited equipment problems at the Navy Regional Medical Center in Charleston, S.C. "I remember one particular December," he said, "Our hospital ran out of the most common birth-control pills, the most common antibiotic, the most common-size surgical suture and the most common-size surgical gloves. The hospital commander could not begin to reorder them until the end of the month and a new quarter began."

The surveyed physicians' appraisal of military medical equipment is supported by other observers of military health care.

Bill Stanhope, a professor of community medicine in Oklahoma City, Okla., spent a year touring military medical facilities in his capacity as an aide to U.S. Rep. Robin L. Beard Jr., R-Tenn., a member of the House Armed Services Committee. "When I was in Europe, the orthopods hadn't had simple ankle screws for several months," Stanhope recalled.

At Georgia's Fort Stewart, division surgeon Maj. Steve Herman recently explained that circumventing official channels is a continuing necessity for a military doctor who wants the best equipment. Dr. Herman, who attended medical school after serving as a tank commander in Vietnam, said he recently called Army medical headquarters about his need for new devices which can monitor heart functions at medical units in the field.

"The guy in charge said they had identified the need and that they are going to start field testing in those in January," Herman said. "That means it will take maybe a year or two before we get them. But we need them for our field exercises. I intend to get it for my division long before the Army gets around to that."

### DOCTOR WENT AWOL OVER EQUIPMENT

The Association of the United States Army, a lobbying group on behalf of soldiers, has complained about conditions even at the Army's eight elite medical centers. The association said 41 percent of the doctors assigned to the prime hospitals indicated in a survey several years ago "that inadequate facilities played a part in their decision to leave (the Army)."

In one unusual incident, an Army physician charged with going AWOL argued that his flight from the military was justified because recruiters had lied when they promised he could work with the latest equipment. Although Dr. Leon Davis had been assigned as a radiologist to Walter Reed Army Medical Center in Washington, D.C., the centerpiece of the Army medical system, he complained that facilities were "poor and outdated."

Davis lost his court-martial trial, but the military judge imposed only a fine, and not a possible three-year jail term. And the judge warned military recruiters to "clean up their recruiting act" if they expected to attract physicians.

While the physicians were harsh in their appraisal of medical equipment and facilities in the military, a majority (59 percent) rated the quality of support personnel—such as nurses and lab technicians—as equal in military and civilian medical institutions.

Ten percent said their support personnel had been superior in the military. Dr. Paul A. Whitlock Jr., a surgeon now practicing in Statesboro, Ga., said seven years at Navy hospitals in San Diego, Calif., and Corpus Christi, Texas, convinced him that "the military has far better trained paramedical personnel," particularly when compared with those at smaller civilian hospitals.

Nearly one-third of the physicians rated support personnel as inferior in the military. This group cited staffing shortages and the difficulty of removing bad workers: In the military, they learned, a doctor cannot fire his nurse.

When military recruiters turn their attention to physicians, a strong pitch is that the work schedule will be easier than in civilian practice. "Your duties will allow more time with your family," promises one brochure titled, "Your Future in Army Medicine."

For the physicians surveyed, this promise held true. Three-quarters said their workload was easier in the military than in civilian practice. Only 9 percent said they worked harder as military doctors.

Dr. Randy Barfield, a pediatrician, had the good fortune to be stationed at the Navy base in Key West, Fla. He recalled fondly a work pace that left time for one of his colleagues to keep his water-skiing skill near the level that once won him a world championship.

For some of the physicians, however, the shorter hours were a negative factor. Some said they could not practice enough in their specialties. And many said their experience led them to believe that the promise of an easier life attracted too many poorly motivated or incompetent physicians to the military.

More than half of those surveyed found no overall difference between the quality of their colleagues in military and civilian medical institutions. Many pointed out the simple fact that the same doctor who was a civilian one day might be a serviceman the next—and vice versa.

But more than a third of the doctors surveyed rated the quality of physicians as lower in the armed services.

### I'M IN MY SANDALS AT THE BEACH

Military recruiters and health officials do not dispute the fact that some physicians flee into the military to get away from troubles in civilian practice. Gen. Pixley said that during the extreme physician shortages, "the fact is, a number of older physicians did join who did not turn out well."

In written comments and interviews, the surveyed doctors told frequently of colleagues whose desire for an easy life meant poor medical care for patients.

A recollection of Barfield, the former Key West naval doctor, was not untypical. "I was in the emergency room, and I went up to look at a patient a nurse said didn't look well. The patient was dying," he said.

Barfield said he made several calls to locate the physician who had been treating the patient. "He was at the beach and didn't want to come. He basically said, 'We've done what we can do,' " Barfield recalled.

"I guess he had in effect written her off. He said, 'I'm in my sandals at the beach.' "

Dr. Thomas S. Breza, a former Army dermatologist now practicing in Lauderdale-By-the-Sea, Fla., was most cynical in questioning some colleagues who volunteered for military service. "What physician would work in the worst facilities, understaffed, (and be) moved frequently unless he was incompetent?" he asked. "One can earn much more on the outside—I earn 15 times more—see less patients and live where he wants."

Like Breza, other surveyed physicians claimed there are structural flaws in the military-care system.

Dr. M. A. Wentworth of Waimea, Hawaii, noted that direct patient care is largely left to younger, less experienced practitioners fulfilling their military obligations. Veteran physicians in the military, he said, often aspire to administrative positions in which they "see less patients. If they were good (physicians), this was unfortunate."

Dr. David B. Crawley of Coer d'Alene, Idaho, found doctors competent in the military but health care "somewhat inferior." This was due, he said, to "lack of continuity of care," which was inevitable because both doctors and patients were routinely transferred from post to post.

"Military medicine is cheap to the patient but very impersonal," said orthopedic surgeon Dr. James G. Killebrew Jr. of Atlanta. He and others remarked on the drawbacks of the constant moving and having to practice in busy clinics. "There is little room for any meaningful doctor-patient relationship," he said.

The final question asked the physicians where they would prefer their own families to receive health care. Nearly 85 percent said they preferred treatment outside the military.

Dr. David Arrowsmith, a dermatologist in Pensacola, Fla., was uncomfortable with the military system under which almost all physicians—regardless of their specialty—take turns as "medical officer of the day," making them responsible for the hospital emergency room during the evening and through the night.

"If you were seriously injured in an automobile accident, would you want to trust the initial decision-making of your care to a pathologist, radiologist or psychiatrist?" Arrowsmith asked, then answered the question himself: "That's not fair to the patient or to the physician, who is too far from medical school and internship to feel competent in emergency care."

### A FEW PRAISE THE MILITARY WAY

Army psychiatrist Dr. Lee Haller said he did not wait until his discharge to act on his conviction that civilian health care was preferable. "My wife was pregnant, and she delivered in a civilian hospital," said Haller, who now practices in Washington, D.C. "We wouldn't have let her get pregnant if she had to deliver in my Army hospital."

On the other hand, Dr. Kent N. Leifer rated the quality of health care as much better in the military than in civilian society. He was one of the four surveyed doctors who said he would choose to be treated in the military—"depending on which facility, obviously," Leifer explained.

An allergy specialist now practicing in Merritt Island, Fla., Leifer recited the dangers of civilian medical practice; physicians who do unnecessary surgery because they make a profit from it; physicians who order excessive laboratory test because they fear malpractice suits; and the poor self-policing in the ranks of private practitioners.

"Too many civilian physicians can't afford to be honest," he said. "I found military medicine more honest."

Leifer recalled his first year at Fort Benning in Columbus, when he was left alone to run an Army allergy clinic, as a glorious time. In his second year, Leifer was asked to serve also as a pediatrician, which disturbed him, and he left the Army at the end of his commitment.

Leifer said he has not enjoyed the business demands of private practice ("you learn by goofing up") and considers reenlisting so he can simply "practice medicine."

Dr. Daniel G. Knauf, a Gainesville, Fla., heart surgeon who served 14 years in the Air Force, also rated military health care as superior to its civilian counterpart. He too, said he would choose to get his own health care in the military.

But Knauf added a qualification to his evaluation:

"Quality of medical care and care providers is declining in the military, because of the military MD shortage," he wrote, "Recruitment programs are too lenient as to quality of physicians obtained. . . . (There are) too many private-practice failures."

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[From the Atlanta Constitution, Dec. 9, 1981]

## "Taking Care of Our Own": A Military Pledge Unmet?

(By Paul Lieberman and Jim Stewart)

Twenty years in the U.S. Army left Donald Bowman with lasting admiration for the work of the military medical system in wartime. "If you have a sucking chest wound, there's nothing like Army medicine," Bowman said recently, recalling with awe a battalion medical officer he saw in Vietnam who calmly went about the work of saving lives during a savage hilltop battle.

Now, as a military retiree, Bowman can get free health care from the military medical system in peacetime, a retirement benefit he thinks he earned. "I spent those years moving around," he said. "My children grew up always leaving their friends. I spent time in a war doing a lot of ducking. Those are some of the prices we paid for those benefits."

Yet now that the dues have been paid and Bowman can collect free medical and hospital care, the retired West Pointer and Silver Star recipient buys health insurance for himself and his family. Of the modern, 377-bed Army hospital only 10 miles from his home in Columbus, Ga., Bowman says, "I stay away from it. My family flat won't go. They feel they are treated like cattle there."

Donald Bowman is not alone in his belief that the distinction of U.S. military medicine in war has not carried over into peacetime.

Responding to a nationwide survey, physicians who had served in the armed forces in recent years agreed with Bowman. They, too, said they would prefer that their own families receive health care from civilian institutions.

Results of the physician survey, together with inside observations of military doctors, are described today in Part I of a series of reports on America's peacetime military medical system.

For the United States, military health care is a $6 billion-a-year operation. It is a worldwide network of 160 hospitals and 310 clinics staffed by 11,200 physicians charged with a staggering double assignment; staying ready to support troops in the event of war, while providing daily care for 9 million servicemen, retirees and dependents.

The American military health-care system is capable of handling 12 million patient visits and delivering almost 100,000 babies a year. Nevertheless, a military which long has prided itself on self-sufficiency is having to qualify its traditional pledge, "The Army Takes Care of Its Own."

With a shortage of more than 1,700 specialist physicians, the armed services increasingly are shifting to the private sector the burden of filling military health needs. The government expects to pay civilian physicians $1.1 billion next year to treat an overflow of military patients.

The Atlanta Constitution's reports are based on the poll of physicians, a survey of medical boards in the 50 states, court records, visits to military health facilities, and more than 200 interviews conducted around the country over a four-month period.

The examination of military medicine was prompted, in part, by a series of events at one of the largest military hospitals in the country, Wilford Hall Medical Center at Lackland Air Force Base in San Antonio, Texas.

The Constitution reported in October that Air Force medical officials had ignored—and later denied knowledge of—repeated warnings that too many heart-surgery patients were dying at the 1,000-bed hospital, the centerpiece of the Air Force health-care system. The warnings stemmed from internal hospital studies showing that operations performed by the Air Force's chief heart surgeon resulted in a 43 percent patient mortality rate.

In late October, two former officials of the Air Force hospital alleged that their names had been forged on documents covering up the problems in the heart unit.

On Thursday, Part II of the series will examine one of the questions raised by the Wilford Hall incident: What happens when the military has problems with a physician? Case studies and a nationwide survey of state medical boards show that the armed services routinely send problem physicians out to practice on civilians—without any warning to civilian medical authorities.

On Friday, Part III of the series takes a ground-level look at health-care delivery at two Army bases where overcrowded clinics sometimes cause uneasiness and frustration among doctors and patients alike.

Military officials are well aware of the significance of medical care to the military community. Polls of armed forces enlisted personnel show that they rate healthcare as second in importance after salary.

"The military is a worldwide operation populated by young people with growing families," said Dr. John H. Moxley III, who recently completed two years as assistant secretary of defense for health affairs. "One of the things they like to insure themselves (of) is that the basic services for their families will be taken care of."

But speaking last year to a meeting of military physicians, U.S. Rep. G. V. Montgomery, D-Miss., of the House Armed Services Committee, said he was hearing many complaints from servicemen and retirees about their health care.

"There can be little doubt that many of these complaints are justified," Montgomery said. "The administrative headaches, shortages in medical specialties, and day-to-day problems in particular locations have greatly angered the military community."

Montgomery warned of the implications of inferior health care during the era of all volunteer armed forces.

Only one military doctor in memory has been court-martialed for actions relating to his care of a patient, according to the Defense Department.

At a time when most states routinely notify each other of disciplinary actions against physicians, and have passed laws to help their medical boards learn of potentially dangerous practitioners in civilian institutions, medical mishaps in the armed services regularly go unreported.

"As for the military, I don't think any medical board has an idea what goes on there," said Robert Rowland, executive director of the California Board of Medical Quality Assurance. "I don't know anything about their quality assurance. I'm worried about the physician who gets out and comes back (to California) like nothing ever happened."

### AIR FORCE WITHHELD INFORMATION

The Atlanta Constitution's examination of the disciplinary process within the military medical system was prompted by a series of events at one of the largest military hospitals in the country, Wilford Hall Medical Center at Lackland Air Force Base in San Antonio, Texas. In those events, the failure of Air Force officials to communicate information about a physician may have helped cause a tragedy in an operation on a civilian patient.

After internal studies at the 1,000-bed hospital showed that operations performed by the Air Force's chief heart surgeon resulted in a 43 percent patient-mortality rate, Air Force officials approved the transfer of the surgeon, Col. William Stanford, into a fellowship with civilian physicians in Milwaukee. The civilian physicians were not told of the internal hospital data on Stanford. They later said they would not have accepted the Air Force's offer of Stanford had they known of the high death rate.

On May 2, 1978, Stanford hooked up a heart-lung machine backward to a Milwaukee woman undergoing a routine coronary-artery bypass operation, and the patient went into a coma.

Stanford later returned to Wilford Hall, retired from the Air Force and entered private practice last year.

A recent incident in Georgia showed a similar failure to share information within the armed services themselves. An Air Force physician was transferred to the Army with good recommendations and was appointed head of pediatrics at Fort Stewart, the huge post west of Savannah. Within months, angry Fort Stewart medical officials moved the man to a much less sensitive post as a general practitioner at an out-patient clinic.

"He was not capable of providing adequate care, especially to critically ill youngsters," said Col. Herb Segal, chief of staff at the Fort Stewart hospital. "He had been chief of the (pediatric) service at the Air Force facilities he left. I believe they lied about him just to get him out of the Air Force."

Segal said the experience reinforced his belief in "the need to police ourselves."

America's military health-care system spans 160 hospitals and 310 clinics worldwide. A force of 11,200 physicians serves 9 million active-duty servicemen, retirees and military dependents.

Military medical officials readily concede that more than a few bad doctors have tried to hide in the huge health-care network, especially when manpower shortages have made the armed services desperate for volunteers. "The Army, Navy and Air Force currently list combined shortages of 1,700 medical specialists.

"No ifs, ands or buts about it, we get a lot of applicants on the run from something," said Lt. Col. Richard F. Helmbold, a recruiter at the Army's medical-officer procurement office in Atlanta.

"The fact is, a number of older physicians did join who did not turn out well," agreed Lt. Gen Charles Pixley, who recently completed four years as Army surgeon general. "We've had a number terminated."

Asked whether civilian licensing boards were notified when the Army took its own disciplinary action against a doctor, Pixley said, "I have never felt there was a problem there, never thought too much about it."

### FEW DOCTORS GET NEGATIVE REPORTS

A Department of Defense spokesman said that while the armed services may not volunteer information about problems with doctors, they will answer inquiries from civilian authorities "with the 'right or need to know.'" This occurs, said spokesman Bill Caldwell, "When a physician applies for licensing in a given state and signs a waiver giving the state board access to information held by the services."

Many military physicians, however, do not have to apply for a state medical license when they leave the armed services to enter civilian practice. Although active-duty military doctors are not required to be licensed in states in which they are stationed, most hold licenses in their home state or others—and can return to any of those states without filing a new application.

When military doctors do apply for licenses in new states, medical boards report varying success in getting information out of the military.

Robert Dobart, administrator of the Maryland Commission for Medical Discipline, recalled his frustration trying to learn details of an operation in a Maryland Army hospital in which a child got a drug overdose and "wound up being more or less a vegetable." Dobart said he wanted to find out who the doctors were so he could check on whether they were licensed in Maryland.

"We had a great deal of difficulty getting any information," he said. "I'm not saying it was a deliberate attempt to impede us. It was just more difficult than dealing with civilian hospitals."

Dobart said he finally learned that the physician who performed the operation was not locally licensed.

John J. Ulwelling, executive secretary of Oregon's medical board, said that "it's hard to get good information" simply because both military doctors and hospital commanders frequently move from post to post. A background check, Ulwelling said, may gain the physican's discharge papers "and maybe one reference letter. Very seldom do you get a negative report."

In the Wilford Hall case, negative information apparently was carefully kept off official records.

Dr. Clifford Buckley, the former chief of surgery at the huge Air Force medical center, said it was suggested to him by top hospital officials that he write a favorable "OER"—Officer Effectiveness Report—on Dr. Stanford, the Air Force's senior heart surgeon. Buckley said that after he refused, his name was forged on a report that made no mention of controversy over the heart surgeon's operative mortality rate.

The Air Force was cooperative with civilian authorities in the case of another physician. The New Mexico Board of Medical Examiners, noted for its careful background checks on doctors applying for licenses, wrote the hospitals were the physician had worked and was told by one commander that the man was "not retained" because of "substandard care and lack of communication" with patients.

Board administrator Michelle McGuiness said evidence at a hearing showed the physician had been "making advances" to female patients. The New Mexico board voted last year to deny the man a license, citing "unprofessional conduct."

### STATES SHARE DATA ON CIVILIAN DOCTORS

The haphazard communication of background information when a physician moves from the military into civilian practice can be contrasted with procedures used when a physician moves from state to state.

Even civilian licensing officials readily admit that the ability of bad doctors to jump from hospital to hospital, or from state to state, is a longstanding problem in the profession. And U.S. Rep. G. V. Montgomery, D-Miss., a member of the House Armed Services, said recently that the military is better able to keep an eye on physicians because "we've got a record on them." In civilian society, a hospital may know a doctor is bad, yet "they give him a good record just to move him on."

In recent years, however, the communication of information about problem doctors in civilian practice has been improved through two developments.

One has been the adoption in a majority of states of laws seeking to force the reporting of potentially bad doctors to medical boards. Some laws require hospitals (and other health-care institutions) to notify their state board of all internal disciplinary actions against staff physicians, such as a denial of surgical privileges. Other laws require that insurance companies notify boards of malpractice judgments.

The second development is the nationwide sharing of records of disciplinary actions taken by different states against physicians. The Texas-based Federation of State Medical Boards, which serves as the clearinghouse for such information, last year alerted the 50 medical boards of 768 disciplinary actions—license revocations, suspensions and reprimands—taken by other states. "Only a couple don't report," said executive director Dr. Harold Jervey.

Gary R. Clark, executive secretary of Missouri's medical board, said he would like to see the federation also serve "perhaps as a central depository for information from the military." Like other medical board officials, Clark is uneasy that his information about doctors leaving the military is "somewhere between limited and non-existent."

On paper, military physicians are actually susceptible to a wider range of disciplinary procedures than their civilian counterparts. Punishment can range from a verbal reprimand to a court-martial and a prison term.

Pete Esker, a spokesman for Walter Reed Army Medical Center in Washington, D.C., the Army's centerpiece hospital, insists that the military has an advantage in the policing of physicians. His reasoning starts with the visible rank worn on the epaulets of every armed forces physician.

"The chain of command," he said, "acts as the board of medical examiners.

"Discipline here is actually better than in civilian hospitals, where about all they can do is take away your privileges," said Esker, "We've had physicians relieved on the spot. . . . The boss man can say you're through. and you're through."

### AN ALCOHOLIC DOCTOR NEEDS HELP

Military regimen also can be used to force help on a physician who might be allowed to flounder in private practice.

Dr. Richard Schwartz, a pathologist now in civilian practice in Akron, Ohio, recalled being shocked when a new pathologist arrived at the Andrews Air Force Base hospital outside Washington, D.C. The newcomer, he said, clearly was an alcoholic and also had difficulty analyzing tissue correctly.

"He had bounced off several staffs," Schwartz said, adding that the man had volunteered for military service "to obtain some employment that would shelter him." The military had been "all too quick" to accept the physician because of staffing shortages, he said.

Schwartz said the physician first was ordered to dry out in a hospital ward. Then he was sent to an armed forces training program for pathologists.

His fellow doctors never learned whether the rehabilitation program would have worked. In what Schwartz called "a tragic ending," the man died before the training program was completed.

According to the legal adviser to the Navy surgeon general, most problems with physicians conclude less dramatically. "Most of the actions (taken) are known only to the doctor and his commanding officer," said Commander Mike Hannas.

Hannas said the threat of writing a less than satisfactory officer-effectiveness report is the most common disciplinary tactic. The reports, prepared at least once annually, weigh heavily in promotions.

Only once, according to available records, has a military physician received the ultimate punishment of a court-martial for poor care of a patient.

By comparison, 216 civilian physicians suffered the maximum penalty available to state medical boards—loss of their licenses to practice—in 1978 alone, according to an American Medical Association study. The AMA study says another 302 licenses were suspended, surrendered or put on probation, and that 268 civilian physicians were reprimanded or censured.

The court-martial stemmed from the actions of a physician at the Great Lakes Regional Naval Center in Waukegan, Ill., in 1979.

The physician, Lt. Muhammed A. Ansari, performed elective surgery on an Army sergeant to correct a fertility problem. Ansari allegedly cut a major blood vessel by accident, resulting in complications and the sergeant's death. Ansari was found guilty of manslaughter at his military trial this August.

The sentence was a fine of $2,000 and placement of a letter of reprimand in Ansari's permanent military folder.

The lieutenant is appealing the conviction. Navy lawyer Hannas said that if the verdict is upheld, the Navy will send the court-martial records to any medical board which licenses Ansari.

In fact, the Kansas State Board of Healing Arts already is aware of the case. Executive secretary Elizabeth Carlson said the board learned of Ansari when military officials requested proof of his licensure for their court-martial. "We are pursuing it," she said.

In civilian medicine, such cases of a physician's alleged malpractice often become known to the public through the court system. In military medicine, malpractice suits are far less common.

### LAWSUITS BECOMING MORE FREQUENT

One of the strongest inducements used by recruiters to draw physicians into the military is freedom from worry about lawsuits. Active-duty servicemen are barred by law from filing malpractice suits. And although retirees and dependents can sue the government, the military physician himself is not liable.

A retiree or dependent first must file a claim under the Federal Tort Claims Act. The government has six months to settle or deny the claim. After that time, the claimant may sue if dissatisfied. If there is a trial, it is conducted by a federal judge without a jury—a rule approved by Congress to hold down judgments.

Monetary claims for alleged medical malpractice by military physicians are on the increase, according to Department of Defense figures recently compiled for The Atlanta Constitution.

Health-care complaints for the Army and Air Force (no statistics for the Navy were provided) totaled 488 in 1979 and 567 in 1980. The Army alone reported paying out approximately $23 million in undisputed malpractice claims for the period. In addition, the Army reports 48 lawsuits pending in 1981 as a result of disputed claims.

Enlisted men or women who want to file complaints against military physicians must turn to the inspector general of the service involved.

Inspector general, or "I.G." complaints, as they are known in the acronymic jargon of the armed forces, are more commonly filed by soldiers with job-related grievances. These complaints are checked by independent investigators.

Doctors are not frequent targets of this wrist-slapping type of action. The Army recorded only 62 medically related I.G. complaints last year and ruled only eight of those to have been substantiated.

According to Col. John Canby, there might have been another recent military court-martial of a physician if the circumstances of his Fort Knox incident had been different.

The physician accused of mishandling a nurse on a hospital elevator was not an enlisted military doctor. He was a civilian "contract" physician hired by the Army to fill a spot left open by service-wide shortages of medical specialists.

If the man had been regular Army, Canby said, "I'd have court-martialed him or something along that line. I wouldn't have tolerated that behavior. And we would have put it in the so-called credentials file.

"This is my hospital; for good or bad, I'm responsible," he said.

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## THE PATIENTS—THEY FACE AN IMPERSONAL, UNDERSTAFFED SYSTEM

(By Jim Stewart and Paul Lieberman)

COLUMBUS.—Army medicine has been an important part of Jess Wheeler's life ever since Japanese rifle fire almost ended it nearly 40 years ago on Luzon in the Philippines.

The bullet ripped through an elbow, destroyed a kidney and richocheted through Wheeler's stomach. He was in the hospital at Fort Devens, Mass., for nine months. When he was released, he decided to stay in the Army for another tour, and then another. "After that, I started weighing the benefits," said Wheeler, who just turned 66.

"I saw both my parents go through long bouts with bad illnesses. They didn't have any health insurance," he said. "My sisters and I dug deep to pay the bills. I didn't want the same thing to ever happen to me."

For Wheeler, the financial security he sought from health worries has paid off. He feels the Army has made good its promise to reward his retirement with free medical and hospital care. Twice, the military has seen him through major difficulties, once with a triple coronary-artery bypass operation the government largely paid for at a civilian hospital in Columbus.

"Oh, sure, things have changed," Wheeler said. "Now, I'm just another old colonel . . . and sometimes get treated line one. It bothers some of my friends to be treated that way, but that's the way it is now."

The "way it is now" is bothering a great many people among the 95,000 active-duty soldiers, their dependents, and military retirees who live in or near this west Georgia riverside town that hosts Fort Benning, home of the United States infantry.

Some retirees, like Donald Bowman of Columbus, buy their own health insurance now rather than accept the free care at Fort Benning's Martin Army Community Hospital. "My family flat won't go," said Bowman. Even some active-duty military personnel at Fort Benning—who receive first priority for treatment—seek out civilian care and hospitalization, according to area physicians.

In a sense, Martin Army Hospital and the diverse population it serves are a microcosm of the military health system that has long prided itself on the pledge to "take care of its own." Reflected there are the concerns about "second-class care" being voiced by some in the armed forces. Also to be seen are signs of a system being overwhelmed. Short by more than 1,700 physicians, the armed services are increasingly sending their dependents and retirees to the civilian sector for medical help—more than 1.1 million of them last year.

A system many soldiers have seen respond with dazzling speed in time of war moves with frustrating slowness to care for routine health problems, some critics claim. Frequently heard are complaints about long waiting periods, constantly changing physicians, understaffed and ill-equipped facilities and, always, a vague sense of distrust between patients and a health-care staff that works in a free-for-the-asking service system.

### IT TAKES A LOT OF PATIENCE

"It can be maddening at times," said Mrs. Lee Morris of Columbus, wife of an Army retiree. "If you're in real need, you'll be taken care of. But you have to break through that outer shell of red tape and bureaucracy and explain the same problem over and over again."

"Pregnant ladies don't know who will deliver their babies," said Donald Bowman's wife, Cynthia. "You would never see the same person twice. That can be so unsettling."

"Sometimes . . . you are made to feel like they're doing you a favor to take care of you," echoed Lisa Rushing, whose enlisted husband comes from a family of career soldiers. "It takes a lot of patience, a lot of getting used to. I'm glad I've never been real sick and had to face it. I don't know what I would do."

But says 73-year-old Col. Herman Goldman (retired), "Some people are always going to complain about understaffing, discourtesy and things like that. But I never heard one of them complain about the price."

The feeling of being less than first priority in a system that serves 9 million Americans worldwide is not entirely mistaken. As Pentagon officials will quickly admit, the primary mission of U.S. military medicine is taking care of soldiers—not their families and and not retirees, who between them account for nearly 70 percent of the health-care population entitled to military medicine.

In actual order of priority, active-duty personnel and reservists in training come first, according to a Department of Defense schedule. Dependents of active-duty personnel come second, while retirees and their families are fourth in line behind ROTC students in training.

"Although many people who come into the service have felt that it was implied by aggressive recruiters that health care in military facilities could be, or might be, provided from the cradle to the grave, official policy has never accepted that," said Lt. Gen. Charles Pixley, who recently stepped down as surgeon general of the Army.

"I've never fought for that. That's a spin-off benefit," said Pixley. "We just want the privilege of taking care of them to the extent resources and facilities will permit. But that's not why we're here. Congress will have to pass new laws if that's our mission."

In Pixley's view, dependents and retirees play an important role in helping meet the needs of military preparedness by offering military physicians a wider range of ailments for treatment than those normally associated with young, healthy soldiers.

Not many active-duty soldiers need neurosurgery, but a neurosurgeon is critcal on the battlefield." said Pixley. "During peacetime, these neuorsurgeons and these other (specialists) have got to have something to do. By committing them to practice medicine on a different age population—the older retirees, for example—they can finetune many skills."

"We sholdn't be ashamed of that," Pixley said. "Every study shows that everything that we do in-house is cheaper for the taxpayer than any other option."

## IT HAS A NEGATIVE IMPACT ON MORALE

When a military facilities cannot accommodate all the eligible patients in an area, those with lower priority have to look outside the military for health care. In those cases, the military pays most of the bills through the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS). But the recipients—unless they are active-duty personnel—also must pay part of the cost.

Army recruiters have recently been instructed not to overstate medical benefits to potential enlistees, according to Ted Wood, director of CHAMPUS, which is headquartered in Denver. "When an 18-year-old is recruited, he's told that he gets free medical care," Wood said. "The problem we have is that when he's a few years older and has a family, (we have to explain) that there are different rules for your family."

CHAMPUS was created in 1966 to handle the health needs of the burgeoning number of dependents brought to the Army by the Vietnam War. Under CHAMPUS, dependents and retirees pay 20 percent and 25 percent respectively of the cost for treatment by a participating civilian physician. Because the government's fee scale usually lags at least a year behind current medical charges, many physicians choose not to participate, according to Wood, who nonetheless has seen his program swell to a $1 billion budget for fiscal 1982 and projects "continual growth" over the next decade.

Recipients of military health care can expect more reliance on civilian medicine in the future and an armed forces system that "is no better than a lowest common denominator in the civilian sector," according to a 1979 study by the Association of the United States Army, which lobbies for increased service benefits and has recently offered its members group health insurance to supplement CHAMPUS.

"The inadequacy of the health-care system cuts two ways," says the AUSA study. "First, it has a negative impact on morale by imposing continous uncertainty in the minds of soldiers about what they might expect in the way of care for themselves and their families. Second, its gross shortage of capability makes it largely incapable of responding to a sudden mobilization requirement."

"Taken in sum (these problems) constitute the prime current threat to the morale and well-being of the armed forces of the United States," the report concludes.

### I TELL YOU, I WAS SCARED TO DEATH

From ground level, Martin Army Community Hospital rises like a latter-day blockhouse above the scrub oaks and clay hillocks that dominate the landscape here. Across the street are the commissary, the post exchange and smaller facilities where soldiers and their families can save money buying at discount prices. Like the hospital, these facilities are part of what Congress calls the "total compensation" due our servicemen and women.

Like most Army hospitals, Martin Army is designed for rapid expansion during war. Five operating rooms stand ready in addition to the three that are routinely used. In a crisis, bed space could be nearly tripled.

In the Army system of care, Martin Army is a "community" hospital, meaning that it can provide primary care and diagnostic service and perform some surgery for a wide variety of patients. Patients requiring more sophisticated surgery or diagnosis are shuttled from Martin Army on twice-weekly medical evacuation flights to three of the Army's eight training hospitals: Brooke Army Medical Center in San Antonio, Texas: Eisenhower Medical Center in Augusta; and Walter Reed Army Medical Center in Washington, D.C.

Martin Army works quite like any civilian hosptial of a comparable size. On an average day, nearly 200 of its beds will be filled and more than 1,600 patients will come through for treatment, prescriptions or diagnosis. The hospital maintains a round-the-clock emergency-room and ambulance service, while non-emergency appointments normally require a two-week waiting period, according to an Army spokesman.

Sometimes the wait is longer. After experiencing heavy, unexpected hemorraghing, Ann Beamesderfer, the wife of a retired Army officer, scheduled an appointment for a biopsy at Martin Army. "They told me to check back in two weeks; then they told me to check back the next month." she said. "It was two months before I heard if they had found anything. I tell you, I was scared to death."

The Beamesderfers are part of Martin Army's family-practice plan, the most popular by far, of the hospital's services. One of the chief complaints made by patients in the military system is that they rarely see the same physician. To provide continuity of care and a sense of patient-physician relationship, the services began assigning some families to a single physician they could call, make appointments with and consult just as in the civilian system.

The program was an instant success with patients. However, because of the shortage of family-practice physicians, only a small percentage of patients (15,000 out of 95,000 at Fort Benning) is able to participate. Others wishing to join place their names on a waiting list Active duty soldiers report waits of several months, while retirees can expect to wait 2½ years, according to a Fort Benning spokesman.

### IT'S A PLAIN MANPOWER SITUATION

Martin Army's reputation among Columbus citizenry appears to take its color from the hospital's association with the military as much as from the actual health care provided there.

"I'll tell you. I was in the Army once," said Columbus police Officer Ken Wessner. "I know what it's like. Now, if we had a real bad (car) accident right near there, I might take the victims to Martin Army. But it would have to be real bad."

Local physicians are sympathetic to the hosptial's needs but feel the military has brought on its own problems. "I used to help them out some a few years ago," said Dr. Joe Chastain, a Columbus pediatrician. Then, said Chastain, after he spent more than an hour assisting in a Caesarean section and initiating respiration in a new born, the Army paid him $15 for this time. "That kinda cured me," he said.

"I have seen instances where parents will deliberately withhold aspirin from their babies to bring the temperature up to 103 or above because that's the only way they can get the attention of Army doctors,' said Chastain.

With little or no recurring patient population of their own, some Army physicians fall prey to showing "less than adequate" concern for those they treat and their loved ones, Chastain said. "If you bring your child in here for care, I have to be concerned that you leave here pleased as well, or my income is going to suffer," he said. "They don't have to worry about that."

Twice, Dr. W. L. Amos, a Columbus obstetrician who himself served in the Army, has admitted active-duty soldiers from Fort Benning to a civilian hospital for treatment. "They wouldn't have had it any other way,"Amos said.

"It's a plain out-and-out manpower situation, from what we hear," said Dr. John Watson, president of the Muscogee County Medical Society. "We think they do a good practice, yet we think they don't have the expertise that, frankly, they should have in some areas."

Local physicians are also mindful of events surrounding one member of Martin Army's staff, Dr. Emil Romitan, an ear, nose and throat specialist who serves as a civilian contract physician for the Army.

Romitan had been asked to leave two Michigan hospitals after questions about his competency arose, according to court records on file in Macon, Ga. After moving to Georgia and subsequently encountering problems at a Macon hospital, Romitan filed suit in federal court in 1979 seeking an injunction to keep the hospital authorities from cutting off his hospital and surgical privileges.

U.S. District Judge Wibur Owens curtly dismissed the suit: "Dr. Romitan in the opinion of every doctor whose deposition has been taken is not presently competent to practice as an ear, nose and throat physician and surgeon in the defendant hospital or any other hospital," Owens write.

Officials at Martin Army, where Romitan had since moved, learned of the court's actions and initially relieved Romitan from duty. Later, however, they decided to retain his services and placed him in a position with "less responsibility," according to Army spokesmen.

### IT'S THE OLD "CRY WOLF" SYNDROME

Like many military hospitals, Martin Army is short of some military medical specialists. Its manpower and organizational charts, however, can be deceiving. Authorized 67 military doctors, the hospital actually has 84, including 20 residents undergoing training. Also on hand are 26 civilian contract physicians, 59 civilian nurses and 42 civilian technicians. The civilian physicians are needed to fill specialty positions for which the Army has been able to attract but very few physicians—anesthesiology and radiology, for example. Martin Army officials declined requests to discuss manpower requirements at the hospital.

Ted Schumacher served at Fort Benning as an Army attorney for three years. For much of the time, his duties involved investigating and processing claims made for alleged malpractice at Martin Army. After leaving the service, Schumacher went into private practice in Columbus. He has since represented more than a half-dozen clients who have sued Martin Army for malpractice, while only one client has sued a local civilian hospital.

"If you're oriented to civilian time, it can be frustrating because the Army doesn't think of time like we do," Schumacher said. "If you're a soldier on sick call, the reasoning goes, the clock still runs and you shouldn't mind waiting. Time is time, you get paid either way. So does the doctor."

"I guess it's the old 'Cry Wolf' syndrome," Schumacher said. "They (military doctors and nurses) get so used to seeing some people abuse the system, who show up to get a little free attention or with a problem that's not serious, that when a real bad one comes along they sometimes don't seem geared to handle it."

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[From the Atlanta Constitution, Dec. 11, 1981]

## Sick Call a Reminder That Military Medicine Is Not as Advertised

(By Paul Lieberman and Jim Stewart)

Hinesville, Ga.—By 8 a.m., an hour into Capt. Lynn Whittington's day as an Army doctor, nearly 50 names are logged in the sick book, and 15 young soldiers sit calmly on folding chairs in the waiting room of Fort Stewart's Troop Clinic One. One man leans back and moans. Another puts his elbows on the chair in front and rests his hands on his head. The others stare at the walls, boredom on their teen-age faces.

Sgt. Bruce Mullin, who mans the book, expects as many as 90 bodies at sick call in the clinic this morning, a Wednesday. "Monday, Wednesday, Friday, these are the days we have PT, physical training," he says. "A lot of people coming trying to get out of work." The book records the complaints: "cold," "flue," "back," "rash," "swollen knee," "glands," "ear."

The names are called one at a time, and the soldiers stand and walk slowly down a corridor to the small examining rooms where they will be checked by any of five physicians' assistants or by Whittington, the one doctor on duty.

"Folks come here for every ache and pain you would never think of seeing a regular doctor for," Whittington says. Then he nods toward the waiting room.

"Don't get the impression most of these men are garbage," he says. He considers for a moment. "Most of them are. But you do see some good medicine," a few cases of real disease.

Whittington is a round-faced man of 26 who speaks in the thick drawl of his home state of Mississippi. He is not here—in the middle of the sprawling Army post known to troops as "Camp Swampy"—by choice. He would rather be training to be a pediatrician.

But Whittington asked the government to pay his way through college, and now he owes four years in return.

It was only this summer that Whittington joined the ranks of America's 11,200 military physicians serving in 160 hospitals and 310 clinics worldwide. Already, however, he senses that Army medicine is different from other medicine. And already he has decided that when his four years are up, he will leave for the freedom of civilian practice.

Whittington, then, will be a challenge to Col. Alcide LaNoue, the hospital commander, and to Col. Herb Segal, the chief of professional services. Part of their job is trying to convince the 30 physicians on the staff to stay on past their service obligations, to get men like Whittington to postpone—or forget—dreams of private practice.

Another part of their job—the main reason LaNoue and Segal were brought here from overseas 18 months ago—is to salvage the possibility of quality medical care at a facility where that once seemed impossible. Even the crop of Army doctors who must practice their profession here every day invariably give the post hospital an unofficial first name—"dilapidated." The "Dilapidated Fort Stewart Hospital," they call it.

Until a new $43 million facility is opened in about a year, Fort Stewart's physicians will continue to treat a patient population of 35,000—half active-duty servicemen, half dependents and retirees—in the sagging conglomeration of wooden World War II barracks-type buildings (built, in fact, by German POWs) that has passed itself off as a hospital for four decades.

It was in an operating room here that a nurse once fell through the floor, and where a physician noticed a bird flying above as he began surgery on a woman. It was here that physicians would try to avoid having their own families be treated, and where the medical staff finally organized and rebelled against a hospital commander two years ago.

### WORST HOSPITAL IN THE ARMY

"I think the past history is more or less common knowledge," says Col. Segal. "I guess it has been said we were hand-picked to take over what was the worst hospital in the Army."

The talk about the old 143-bed hospital is not as painful as it once was, however, because of the modernistic concrete structure visible through the pines across the flat terrain of the base. The new hospital helps Segal make his case to Lynn Whittington and other young doctors that they have a future in military medicine.

"Probably about the 18-month mark here I will start pressuring Lynn, pressuring him about military residency programs," says Segal, who has joined Whittington in a Troop Clinic One examining room.

A physician himself, as are all hospital officials in the military, Segal is beginning to dangle benefits in front of the junior officer. At a time when the all-volunteer armed forces have shortages of 1,700 medical specialists, the game is to offer specialized training at the military's expense. If Whittington accepts, he will get away from troop sick calls, but he also will obligate himself to more time in the Army.

"I probably won't," Whittington says, his voice polite.

A third Army physician adds a different view of the situation. "Nobody is going to volunteer to do this as a career," says division surgeon Maj. Steve Herman, Whittington's immediate superior. "It's not really professionally rewarding. You don't have control over your own life. And there's that threat that you'll be sent somewhere and be killed instantly.

### YOU HAVE TO BE . . . WACKO

"You have to be a little wacko to want to do this," Herman concludes.

Herman actually is not making a case against the military career, to the contrary, he is starting to explain why—despite the obvious sacrifices—he sees a mission "of abiding value" in the dual role of soldier-physician. He is talking about another side of military medicine than the one outlined in recruiting brochures.

A 1977 booklet, "Your Future in Army Medicine," tried to convince physicians that military service would be good preparation for conventional civilian medical practice, a sort of parallel practice. "Your patients come from the total military, dependent, and retired population in your area." the brochure says. "Your patients are an educated and medically sophisticated population, representing the same kind of diversified clinical cases you would expect to see in any busy metropolitan practice."

Whittington has reason to question that description.

Each 7-to-11 a.m. sick call is one reminder. The patients are neither well-educated nor representative of diversified clinical cases. Like most of the all-volunteer armed services, the 24th Division—a rapid-deployment force ready for transport to combat areas at any time—is largely made up of relatively uneducated, lower-class young men. Their medical complaints frustrate more than a few military physicians.

Dr. Tom Danello, who worked in Whittington's job before entering civilian practice in Savannah earlier this year, still is bitter over what he calls "more a cattle rush than medical duty" in which "many people are malingering."

### COME IN PLAY-ACTING

Danello explains: "Guys who didn't want to go marching that day would say they 'fell out,' meaning they fainted. They'd come in play-acting with histrionics that were amazing, trying to look like a 70-year-old who had a stroke.

"In months in a civilian hospital emergency room, I've never had one person who said they 'fell out' and who looked like that. And now I'm seeing all ages. There you were talking about 18- to 22-year-old kids who should never be sick. But 30, 40 percent of them would come through sick call each month, knowing it would get them off duty for a few hours—and that it wouldn't cost them anything.

"They'd say anything," Danello says. "We used to put up a 'sick slip of the Week.' One of them said, 'I can't see while I'm falling asleep.' The next one said his hair would fall out if he went swimming."

Danello says the frustration of seeing many questionable complaints has a bad effect on the military physician. "You come to distrust your patients," he says, "and the danger is that the sick people could be overlooked in the shuffle."

So sick call is one reminder that military medicine is not quite as advertised in the Army brochure. A second comes when Whittington is called to field duty to learn the procedures needed in the event of war.

This is the part of the job that most interests, and worries, division surgeon Steve Herman. He is a Brooklyn native who attended West Point, led a tank platoon in Vietnam and then decided, at 29, to go to medical school. Nine years later, Herman is a physician and crusty field officer at the same time. He says he is on "the cutting edge of military medicine."

Like many top military medical officials, Herman fears that not enough attention has been given since Vietnam to "medical preparedness," and he is determined to train Whittington and other young Army doctors. "I'm going to make him as sophisticated a manager of traumatized patients as there is in the world," Herman says, looking at the would-be pediatrician.

Dr. John H. Moxley III, who recently completed two years as undersecretary of defense for health affairs, argues that the armed services made a mistake by telling physicians that military medicine would mirror civilian practice.

"It's clearly a different career," Moxley says. "It has some very different pluses and some different minuses."

For Whittington, a plus is the schedule. If he is like most physicians who pass through the military, he likely will never again work such regular hours. Usually it's just morning sick call, then staffing an outpatient clinic until 5 p.m. On this particular evening, he also is scheduled to serve his periodic shift as MOD, "medical officer of the day," meaning he will handle the emergency room at night. But he then gets the next day off. "This is fat city," he says.

In addition to the general outpatient unit, there are several specialty clinics around the hospital complex. "No Walk In. Sick Call By Appointment Only," reads the sign on the door to the pediatric building. A dozen young women and their children are in the waiting room.

For Maj. Bill Parker, the chief of pediatrics, the work here also is a bit different than it would be in civilian practice. The average age of mothers here is a few years younger than in a broad civilian population, and many "do not come with effective parenting skills," Parker says. Because the care is free, the confused parents often are not hesitant to come in with minor problems that really don't need a doctor's attention.

"But while an illness may be trivial to me, it's not to the parent," says Parker, who himself grew up under Army medical care as the son of an artillery colonel. "And part of our job is to give support, moral support. For the men who went to Egypt (on maneuvers), it's knowing that their children will be cared for here."

Parker, who has been in the Army six years and earns $54,000, expects to reenlist when his obligation expires in 18 months. "I'll probably go over to Europe or into a fellowship," he says.

### PATIENT . . . NEVER SAW IT

An obstetrician-gynecologist who finished his Army service at Fort Stewart last year, and did not re-enlist, had one of the more unusual experiences in the history of the aged hospital. "You're talking about preparing a patient for surgery and there's a bird flying around in the operating room," recalls Dr. Carl Dohn, who now practices in Brunswick. "The patient was asleep, thank goodness, and never saw it. And there was a hole in the floor through which you could see the ground."

Dohn arranged for his own wife to give birth in Jacksonville, Fla. Later, however, his wife's appendix burst, and she had to be operated on here. The surgery went fine, but Dohn says she decided to come home after she later went to the bathroom attached to her room and found "a roach sitting on her toothbrush."

Dohn was one of the physicians here when the unfortunate conditions combined with an unpopular commander to prompt an unusual action by the medical staff. Approximately a dozen of the Army physicians signed a document, charging that the commander was rigid, refused to see patients himself, and cut corners to the detriment of care at the hospital.

That commander was transferred soon after. The new commander, LaNoue, does see patients, as does Segal, who takes a regular turn in evening emergency-room duty.

Perhaps because of the earlier discord, many of the recent additions to the staff of physicians have come from Army medical training programs rather than civilian programs.

Capt. Tom Dillard, a new internist, did his residency at Walter Reed Army Medical Center, the Army's showcase hospital. He is an easygoing man of 28, a North Carolinian who dabbles in writing country music. He already plans to undergo additional training in the Army, but he seems wary of making the military a career because he does not enjoy moving frequently from post to post, a frequently unavoidable part of military life.

Dillard arrives about 8 a.m., makes two rounds of the hospital each day, sees a series of patients in a small examining room, and usually is done by 5 p.m., although he is on call for emergencies every third day.

### GET MISERABLE ONES OUT

Dillard is a positive talker who would be glad to see those who are miserable in the military "get out." Still, he is a little unhappy that he has to type his own reports ("finding a secretary who can take dictation can be hard"), and while he doesn't think the setting affects his medical practice, he looks forward to the new hospital.

"I do feel bad about people who come suddenly ill, if they're going to die," he says after making afternoon rounds. "I don't want their families to think they didn't get the most modern care."

By 6 p.m., almost all of the Fort Stewart physician staff is gone, and the hospital wards and emergency room are left to support personnel and Lynn Whittington, the medical officer of the day.

There are five patients in the waiting area of the emergency room as a soldier carrying a dirty child of about 2 leaves an examining room. "Had a bunch of ear infections, several colds, four or five colds," Whittington says, "and one real emergency, a fellow who had a tree fall on his head."

Whittington knows that all hospital emergency rooms are abused by some patients who really don't need them, who could just as easily wait for an appointment during regular office hours. Such overuse is only a little more evident in military facilities, where the care is free.

"It's part of the job, I don't mind really—until they get you up at 2 a.m.," says Whittington.

As he talks two more patients, soldiers' wives, apparently, enter the emergency room and sit down to wait.

## REAL CRITERION FOR STAFFING IS BIG-WAR MEDICAL NEEDS

"What is the requirement? Well, the magic figure we always hang our hat on is the number that would be required of medical officers worldwide in the Army for the first few hours, first few battles of a so-called NATO-Warsaw Pact scenario. That seems reasonable, for in actuality, the sizing . . . during peacetime is somewhat based on that potentiality. Now that figure was 5,273—documented a dozen times. Challenged and studied and survived. That figure is still valid today—5,273.

"The specialties that we have the greatest difficulty (obtaining) are neurosurgery, ENT (ear, nose and throat), urology and orthopedics. These are the specialties that, on the marketplace in civilian life, make the most money. And therefore it is quite likely hard to retain these specialities. We are surviving, we are getting better, and I believe there is light down the road at the end of the tunnel.

"Our mortality and morbidity was spectacularly low in Vietnam. Why? Because in the great majority of the cases where the man was wounded, at the site of the wounding within 15 or 20 minutes we could have a helicopter pick him up and deliver him right into the hands of a surgeon. We can never assume that we will have the luxury again. We can never assume, for example, that this country will have air superiority and be able to do that again.

"Although many people who come into the service have felt that it was implied by aggressive recruiters that health care in military facilities could be, or might be, provided from cradle to grave, official policy has never accepted that. The magic figure of 5,273 physicians, for example, has no relation to the number of dependents and retirees who are eligible for care—absolutely none. It's based on the active-duty mission.

"The fact is (that) a number of older physicians did join who did not turn out well. There are others who have been outstanding. It's hard to make an across-the-board generalization. The fact is, though, that if you have one bad apple, it looks like the whole world is full of bad apples. We have tried to detect those. We are definitely tightening our belt. Our standards today are much more critical. We are extremely cautious on foreign medical graduates, for example. I'll admit that some of our post and station hospitals looked like a foreign legion for a while.

"Sick call is as old as armies, 5,000 years old. There will be a certain percentage of troops that will malinger to get out of something. That's also the job of the doctor. Some doctor has to bite the bullet, even though it's wasting his time, and say, 'Soldier, there's nothing wrong with you. Go back to duty.' Somebody has to do that.

"It is alleged occasionally that there is a conflict, that you can't be a good physician and a good soldier. That is a myth. There is no reason in the world why the goal of every military physician should not be to be an outstanding physician, an outstanding medical specialist, an outstanding soldier, airman or sailor. Why should they be one first? Yes, the military milieu has its traditions, customs and regulations. But when in Rome, do as the Romans do, or don't go to Rome."

## MEDICAL CARE—U.S. CAN GIVE IN WARTIME INADEQUATE?

(Col. Chris Bisgard heads the military medical preparedness unit at the Pentagon in Washington, D.C. Bisgard joined the Army in 1973, while in medical school. He studied aerospace medicine, spent a year in Vietnam ("where I had an opportunity to see how helpless wounded people are"), and later transferred to the Air Force. To Bisgard, civilian medicine is "totally focused on disease . . . the sick patient coming into your office." He prefers military medicine, whose goal he describes as "to keep people from getting sick in the first place." At his office in the Pentagon, which is dominated by a huge wall map of the world, Bisgard described his concern over the war readiness of America's military medical corps:)

"Somebody has got to take care of the people who put their butts on the line. In Vietnam, the care was very good. But starting in 1973 when the draft ended, everybody expected the military budget to go down. Military medicine became a peacetime pursuit—'Take care of those eligible beneficiaries.' Physicians were put in hospitals to deliver medical care. A whole generation grew up thinking that's all there was—peacetime military medicine.

"The conscious recognition that war is a possibility is hard to accept, not just for the military. In 1978, 79 maybe, there started to be a growing awareness in the military medical community that the Soviet threat was greater than we had appreciated, and that that had some medical implications. What we saw frightened us. . . .

"We have three active Marine divisions. Those are forces which could be committed to combat, if that is the national will. But the medical support, adequate medical support, doesn't exist. We don't have a hospital ship anymore. If they go, they go without medical support. Even in the Revolutionary War, our nation didn't do that. . . .

"If we look at a war in Western Europe—just bombs and bullets, NATO forces against Warsaw Pact forces—they have to have that surgery there. If they don't get it, they'll die. Right now, we could care for one casualty in 10 who would need it. I mean, if we took everything the Army owns and put it in Germany, we could care for one in 10.

"The Air Force and the Navy have less than the Army.

"The price tag for buying the supplies and equipment to provide the minimum of medical support is $2 billion. This shows you how long we have ignored this.

"We don't have the manpower any more than we have the equipment. The really crying need is in the reserve force. That's where we need the surgeons. They're not there. Coming out of Vietnam, who the hell wanted to be in the reserves?

"Today we don't have enough evacuation crews, nurses and medical technicians. (But) just having physicians and nurses isn't enough. They have to be trained to handle casualties. It's different, and you don't get that doing regular peacetime medical care.

"Five years ago, the attitude (toward physicians) was, 'If you don't shape up, we're going to send you on a field exercise with the troops.' The youngsters coming out of medical school today, it's a whole new ballgame. Today they are exposed to field exercise. They say, 'When do I go into the field?'—they really look forward to it. Military medicine is different, it's exciting.

"Who writes (their congressman) and says, 'We need piles of equipment stored in Europe?' (They send) letters about the retirees who didn't get care.

"(How is) the national will created to avoid a slaughter on the beach? We have never fought a war where we couldn't provide medical care."

Senator GRASSLEY. Our next witness is Mr. W. Ronald Bonds, Deputy Assistant Attorney General of the Civil Division of the Department of Justice.

Mr. Bonds, we appreciate your being with us today, and we are anxious to hear your testimony on this important matter. As is our custom, your entire statement will be inserted in the record, and we would appreciate it if you could summarize, although because this is such an important issue, I do not want to cut you off, but I would appreciate it if we do not get a word-for-word repetition of what we are going to print.

## STATEMENT OF W. RONALD BONDS, DEPUTY ASSISTANT ATTORNEY GENERAL, ACCOMPANIED BY JOHN EULER, ASSISTANT DIRECTOR, TORTS BRANCH, DEPARTMENT OF JUSTICE

Mr. BONDS. Thank you, Senator.

Senator, let me introduce John Euler, who is with me today. He is the Assistant Director in our Torts Branch.

Mr. EULER. Good morning, Senator.

Senator GRASSLEY. Good morning.

Mr. BONDS. Mr. Chairman, I appreciate this opportunity to appear before you today to present the views of the Department of Justice on the Feres doctrine. We understand that you are interested in an explanation of the doctrine, a review of its current status, and a commentary upon the relationship of the doctrine to requests for private relief legislation.

I have submitted a written statement for the record, discussing these three topics in detail, and if I may, and at your suggestion, I would like to briefly summarize our written testimony, and then we will be happy to answer any questions you may have.

The doctrine derives its name from the case of *Feres* v. *United States,* which was decided by the Supreme Court in 1950. Put simply, it stands for the legal proposition that a member of the uniformed services cannot sue the Federal Government or another serviceman or a civilian government employee in tort for injuries arising out of or received within the course of activity incident to his military service.

As background to the Feres doctrine, it is useful to understand its legal context. The United States, as sovereign, is immune from suit unless it has consented to be sued, and the United States may define the terms and conditions upon which it may be sued.

Prior to the adoption of the Federal Tort Claims Act in 1946, suits against the United States for money damages respecting torts committed by Federal employees were precluded by the doctrine of sovereign immunity.

The Torts Claim Act constituted a limited waiver of sovereign immunity. With the *Feres* case in 1950, the Supreme Court was called upon to decide whether the Tort Claims Act was intended to yield that aspect of sovereign immunity which concerned the relationship between soldiers and their Government. In *Feres*, the executrix of *Feres* sued to recover for the alleged negligence of the Army in causing the death of her husband, who had died in a barracks fire while on active duty. The Court held that the Government is not liable under the Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.

Three reasons have been primarily relied upon for denying servicemen recovery under the act. The first is the availability of a viable alternative to damage suits in the form of statutory compensation. In this regard, Congress established a comprehensive disability retirement system for service members permanently injured in the line of duty. Additionally, the Veterans' Benefits Act provides a similar system of medical care and income for the veteran and his family.

The Supreme Court in *Feres* and the lower Federal courts through the years have forcefully emphasized that the benefits available under the statutory system developed by Congress are not only adequate and comprehensive, but also compared favorably with those provided by most State workmen's compensation statutes.

The second reason supporting broad application of the Feres doctrine by the Federal courts through the years is the traditional reluctance of the American courts to intervene in military affairs. The courts have recognized that an adverse impact upon military order, discipline, and effectiveness would result if servicemen were permitted to sue the Government or each other for the negligent orders given or negligent acts committed in the course of military duty.

The third policy consideration recognized by the Supreme Court in *Feres* is the distinctively Federal character of the relationship which exists between the United States and its military personnel and the unfairness of permitting servicemen's claims to be determined by local law lacking in uniformity, as would be the case if suit were permitted under the Federal Tort Claims Act. Mr. Chairman, we submit that these policy considerations are just as valid today as when first articulated.

If I may, I would now like to turn to the current status of the doctrine. The holding of *Feres* has been broadly applied by the courts and has now stood for 32 years without either legislative or judicial alteration. It is even stronger today as a result of the reaffirmation of the rationale by the Supreme Court in *Stencel Aero Engineering Corporation* v. *United States* in 1977. The Feres doctrine has been applied over the years in situations embracing all facets of military activity. For example: medical malpractice, recreation, and voluntary service. The doctrine has not been limited to negligence actions. The courts have uniformly applied the Feres rule to bar recovery for service-connected intentional torts. In addition, the courts have also applied the rule to cases arising out of alleged constitutional violations, including claims against individual Federal officers.

There have been some recent attempts to erode the doctrine. In 1979, a U.S. district court, in the case of *Thornwell* v. *United States,* ruled that there was a narrow exception for cases involving intentional torts committed in the service followed by negligent failure to warn or treat after release from the service, the latter portion of the wrong being actionable. For the most part, the case has not been followed and has even been criticized as posing an unworkable standard for providing relief.

Also, in the recent case of *Wallace* v. *Chappell,* the Ninth Circuit Court of Appeals erroneously refused to apply the Feres doctrine to a *Bivens* suit by several Navy enlisted men filed personally against a number of officers alleging discrimination. The court relied largely upon equitable relief cases in its analysis, and we are presently considering a petition for certiorari in that case.

In conclusion, it is the view of the Department of Justice that the Feres doctrine is a sound and necessary rule of immunity which permits the armed services to be free to go about their mission of defending the country. At the same time, the remedies available as alternatives to lawsuits, as I have previously mentioned, provide a means for meaningful redress and compensation for those who are injured in the course of their military service.

Mr. Chairman, I would like to conclude by discussing the relationship of the Feres doctrine to private relief legislation. For many of the reasons stated above, particularly the availability of alternative statutory or regulatory compensation, private relief legislation would usually not be appropriate or necessary. Moreover, plaintiffs who seek a judicial remedy because of the existence of a valid rule of law should not normally be permitted to shop in a different forum, the Congress.

We recognize that a general doctrine designed for the greater good, such as Feres will, on a rare occasion, work an inequitable result in an individual case. For the very few cases of this nature that arise, Congress can provide a safety mechanism through the option of private relief. Thus, the Department of Justice would recommend that Congress continue to administer the private relief mechanism with a view toward reinforcing the doctrine, the reasons behind it and the general principle of not permitting collateral efforts by litigants to avoid proper judicial decisions. At the same time, enough flexibility should be retained to recognize the rare case where relief is truly warranted.

Mr. Chairman, we would be happy to answer any questions you may have.

Senator GRASSLEY. Yes; I have several questions. Thank you, first of all, for your testimony. I am sorry I passed over that, but we do appreciate you taking time out of your busy schedule to come before us to help us try to solve some of the problems facing this subcommittee.

First, I would like to have you elaborate on a point wherein you suggested that waiving the Feres doctrine and allowing servicemen to sue the Government for compensation might not be in the best interests of those very same people, our servicemen. The Supreme Court also touched on that point at page 145 of the *Feres* opinion.

Mr. BONDS. Senator, as I indicated, the statutory compensation scheme established by Congress provides a serviceman who is injured with extensive benefits which include disability compensation, extensive medical care, and compensation for dependents. In order to bring a suit under the Federal Tort Claims Act, the serviceman would be required to hire a lawyer to obtain the same, or perhaps even a lesser award, in view of the fees, the costs, not to mention the uncertainty inherent in litigation. Litigation might well result in a substantial delay in the ultimate receipt of compensation, which is not the case with the statutory scheme. In addition, it would subject both the defendant serviceman and the plaintiff serviceman to the vagueries of the laws of the 50 different States. Finally, the statutory compensation scheme is based on a theory of no fault, but the serviceman would be required under the Tort Claims Act to prove negligence or some other theory of recovery in order to receive compensation. And I might add on that point that this also might entail either a limited, or no recovery at all, if the serviceman himself contributed to his own injury.

Senator GRASSLEY. You know that punitive damages are denied under the Federal Tort Claims Act, and we also know that all medical care is provided under the Veterans Benefits Act. So, my next question to you deals with, What does a service person stand to gain if the Feres doctrine would be overturned?

Mr. BONDS. Well, Senator, as I just outlined, the compensation scheme provided by the military service, which I think the VA will address in detail, provides extensive benefits which would compensate the serviceman adequately for his injury, and I see nothing to be gained by suit under the Federal Torts Claim Act, only a risk that in fact, the serviceman might receive less of an award and less compensation.

Senator GRASSLEY. My next question deals with the appeals mechanism available for people in the service who happen to believe that their case has not been adequately handled by the Army Board for the Correction of Military Records. Is there an appeals mechanism available, and is it adequate?

Mr. BONDS. Yes; Senator. The courts will review the determination of the Board under an arbitrary and capricious standard, and the vehicle for this relief is generally an action in the nature of a writ of mandamus against the secretary of the particular service involved. In addition, I understand that the Army Board for Correction of Military Records is very generous in its own reconsideration of decisions previously made.

Senator **Grassley**. Could you elaborate on the analogy you offered between State workmen's compensation statutes and the compensation scheme presently available to military personnel?

Mr. **Bonds**. Yes, Senator. Virtually every State has a workmen's compensation statute which provides for equitable relief compensation for the worker involved, but at the same time, limits the exposure of the employer. The benefits under these statutes are paid and are normally, I think in virtually all cases, considered the exclusive remedy for the worker, and he is therefore precluded from suit against the employer or his fellow workers.

In addition, I might add that the compensation scheme established by Congress compares favorably with or surpasses State schemes in the variety and the generosity of the awards. It certainly surpasses many of the awards that are available under State workmen compensation statutes.

Senator **Grassley**. I am a strong supporter of this Nation's service personnel. I am pleased to hear that servicemen are fully compensated for injuries sustained incident to service. However, I would like to know what administrative mechanisms are available to guarantee that our people in uniform are not mistreated or improperly cared for.

Mr. **Euler**. Senator, if I may respond to that, we did touch on other avenues of relief or redress that are available to servicemen beyond the realm of personal injuries, avenues to redress grievances. Certainly, the Department of Defense would be very capable of mentioning that more fully. But certainly, the things we pointed out, I think, indicate that there are meaningful ways of redress. For example, under article 138 of the Uniform Code of Military Justice, a serviceman can file a complaint of wrongs against his commanding officer, and as we understand it, that complaint has to be investigated by an officer superior to the commanding officer, and he has to make specific findings about it. In addition, we took a brief look at Navy regulations, just as an example, and there, a serviceman has a right to request or perhaps even demand an interview with his commanding officer to air a grievance. He also has the right to seek redress for wrongs committed by some other superior other than his commanding officer.

We also know that the Department of Defense and the individual services each have regulations and orders designed to redress grievances in the equal opportunity area and the sexual discrimination area. The Uniform Code of Military Justice itself could be viewed to a large extent as a vehicle to redress grievances committed by one serviceman against another, regardless of rank.

And finally, Senator, I would submit that all of this makes sense and is logical, because the military's mission is to defend the country. If it is going to do that effectively, basic principles of leadership would hold, that you have got to take care of your troops. You have to have a mechanism for legitimate grievances to surface and be redressed. So, it seems to us, in our brief look at it, that the military in this regard has certainly set up a very satisfactory system.

Senator GRASSLEY. Finally, you heard my colleagues testify in regard to the immediate concerns of the Days, and so I guess I would like to ask if you have any suggestions how the Days and their Senators might find out more about the causes of their son's death.

Mr. BONDS. Senator, we have not been asked to review the bill in question, nor are we familiar with the underlying facts. While I certainly cannot speak to the specifics of the case, I do think that there may be other channels available--you mentioned the Freedom of Information Act, and there is also the Privacy Act. I think the Department of Defense is prepared to respond to your question, and we would defer to them.

We would be happy, however, to review the bill and offer our comment at the appropriate time.

Senator GRASSLEY. We might pursue that course, then, later on. Thank you all very much for your testimony.

Mr. BONDS. Thank you.

[The prepared statement of Mr. Bonds follows:]

### PREPARED STATEMENT OF W. RONALD BONDS

Mr. Chairman and members of the subcommittee, I am pleased to appear before your Subcommittee in response to your letter of March 24, 1982 to the Attorney General in which the Department of Justice was invited to present testimony on the Feres doctrine. We understand that the Subcommittee is interested in an explanation of the doctrine, a review of its current status, and commentary upon its relation to requests for private relief legislation, which are entertained by the Subcommittee. I will treat each of these points in turn.

The doctrine derives its name from the case of *Feres* v. *United States*, 340 U.S. 135, which was decided by the Supreme Court in 1950.

Put simply, it stands for the legal proposition that a member of the uniformed services cannot sue the federal government or another serviceman or a civilian government employee in tort for injuries received which arise out of or are in the course of activity incident to his military service. There are three reasons for the doctrine:

(1) the existence and availability of a separate uniform, comprehensive, no-fault compensation scheme;

(2) the effect upon military order, discipline and effectiveness if servicemen were permitted to sue the government or each other;

(3) the relationship between the government and members of its Armed Services as distinctly federal in nature and the unfairness of permitting service incident claims to be determined by local law lacking in uniformity.

As background to the Feres doctrine, it is useful to understand its legal context. The United States, as sovereign, is immune from suit unless it has consented to be sued, *United States* v. *Sherwood*, 312 U.S. 584 (1941), and the United States may define the terms and conditions upon which it may be sued. *Honda* v. Clark, 386 U.S. 484, (1967); *Soriano* v. *United States*, 352 U.S. 270 (1957). Prior to adoption of the Federal Tort Claims Act, suit against the United States for money damages respecting torts committed by federal employees acting within the course and scope of their employment was precluded by the doctrine of sovereign immunity. The Federal Tort Claims Act (28 U.S.C. 1346[b], 2671 *et seq.*), as enacted, constituted a limited waiver of sovereign immunity. *United States* v. *Sherwood, supra; Carr* v. *Veterans Administration*, 522 F.2d 1355, (5th Cir. 1975); *Childers* v. *United States*, 442 F.2d 1299, (5th Cir. 1971); *Simon* v. *United States*, 244 F.2d 703 (5th Cir. 1957); *Martin* v. *United States*, 436 F. Supp. 535 (S.D. Cal. 1977).

With the *Feres* case in 1950, the Supreme Court was called upon to decide whether the Tort Claims Act was intended to yield that aspect of sovereign immunity which concerned the relationship between soldiers and their government. *Feres* was decided along with two companion cases, *Jefferson* v. *United States*, 178 F.2d 518 (4th Cir. 1949), and *Griggs* v. *United States*, 178 F.2d 1 (10th Cir. 1949). In *Jefferson*, the plaintiff, while in the Army was required to undergo an abdominal operation and approximately eight months later after his discharge, in the course of another operation a towel thirty by eighteen inches, marked "Medical Department, United

States Army," was discovered and removed from his stomach. In *Griggs*, an executrix alleged that, while the decedent was on active duty, he met his death because of the negligent and unskilled medical treatment of Army surgeons. In *Feres*, the executrix of Feres sued to recover for the alleged negligence of the Army in quartering him in a barracks known, or which should have been know, to be unsafe because of a defective heating plant, and in failing to maintain an adequate fire watch. The decedent had died in a barracks fire while on active duty.

The common fact underlying each case was that each claimant, a serviceman on active duty, sustained injury due to the action or inaction of others in the Armed Forces.

Reflecting upon the state of the body of law from which the Federal Tort Claims Act carved a limited exception, the Court stated:

"We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving."—340 U.S. at 141.

And concluded:

". . . that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."—Ibid. at 146.

The holding of *Feres* has been broadly and pervasively applied by the courts and has now stood for thirty-two years without either legislative or judicial alteration. It is even stronger today as a result of the reaffirmation of its rationale by the Supreme Court in *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666 (1977), reh. den. 434 U.S. 881.

## FERES POLICY FACTORS

The first of the three reasons or policy factors mentioned above behind the Feres doctrine is the availability of a viable alternative to damage suits in the form of statuory compensation. The present scheme has two tracks or tiers. First, Congress has established a comprehensive disability retirement system for servicemembers permanently injured in the line of duty. See 10 U.S.C. §§ 1201 and 1401. Moreover, should a servicemember leave the service without seeking disability retirement, he or she may later request it. For example, Section 1552 of Title 10, United States Code provides that the Secretary of the Army, acting through the Army Board for the Correction of Military Records (ABCMR), may correct any military record when he considers it necessary to correct an error or remove an injustice. The implementing regulation requires the ABCMR to "consider all applications properly before it for the purpose of determining the existence of an error or injustice," and to make recommendations for correction if warranted to the Secretary of the Army. 32 C.F.R. 581.3(b)(2) (1974); Army Regulation 15-185, paragraph 4. If a former servicemember were to demonstrate to the ABCMR that he suffered permanent disability as a result of a service related injury, the ABCMR could recommend that his records be amended to reflect retroactive permanent disability retirement. Such amendment would create a right to both back pay and continuing benefits.

Second, the Veterans Benefits Act provides a similar system of medical care and income for the veteran and his family.[1] The *Feres* Court stressed the fact that the Federal Tort Claims Act, "should be construed to fit so far as will comport with its words, into the entire statutory system of remedies against the government to make a workable, consistent and equitable whole," 340 U.S. at 139, and that it was thus highly relevant that Congress had already provided, "systems of simple certain and uniform compensation for the injuries or death of those in the Armed Services." 340 U.S. at 144. The Supreme Court in *Feres* and the lower federal courts through the years have forcefully emphasized that the benefits available under the statutory system developed by Congress were not only adequate and comprehensive, but also compared extremely favorably with those provided by most workmen's compensation statutes. *Zoula* v. *United States*, 217 F.2d 81, 84 (5th Cir. 1955). In 1977 the Supreme Court reaffirmed this consideration in the *Stencel* case, *supra*, by stating:

"A compensation scheme such as the Veterans Benefits Act serves a dual purpose: it not only provides a swift, effficient remedy for the injured serviceman, but it also clothes the Government in the "protective mantle of the Act's limitation-of-liability provision." (Citation omitted). Givern the broad exposure of the Government, and the great variability in the potentially applicable tort law, see *Feres,* 340 U.S., at 142-143, the military compensation scheme provides an upper limit of liability for the Government as to service-connected injuries."—431 U.S. at 673.

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[1] 38 U.S.C. §§301-362: Compensation for service-connected disability or death. 38 U.S.C. §§501-562: Pensions for non-service connected disability or death. 38 U.S.C. §§401-423: Dependency compensation for service-connected deaths. 38 U.S.C. §§601-654: Hospital, domiciliary and medical care. 38 U.S.C. §§701-788: Life insurance.

The compensation scheme even prompted one court to comment as follows:

"The military service does not leave those permanently injured in the line of duty uncompensated. Congress has attended to such things in a reasonably adequate way. All we deny plaintiff appellant is a remedy he likes better."—*Bailey* v. *Van Buskirk,* 345 F.2d 298 (9th Cir. 1965).[2]

The second consideration and the broad application of the Feres doctrine by all federal courts through the years can be understood as an aspect of the traditional reluctance of American courts to intervene in military affairs. In *Orloff* v. *Willoughby,* 345 U.S. 83 (1953), the Supreme Court stated:

"We know that from the top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army . . . The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."—345 U.S. at 93-94.

Similarly, in *United States* v. *Brown,* 348 U.S. 110, 112 (1954), the Court said:

"The peculiar and special relationship of the soldier to his superiors, the effects of maintenance of such suits on discipline and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the Court (in *Feres*) to read the Act as excluding claims of that character."

To put it another way, *Feres'* prohibition of intra-military tort litigation derives from society's most elemental instinct: self-preservation through a strong military. For the military to be an effective fighting force, "[n]o question can be left open as to the right to command in the officer, or the duty of obedience in the soldier. Vigor and efficiency on the part of the officer and confidence among the soldiers in one another are impaired if any question be left open as to their attitude to each other." In re *Grimley,* 137 U.S. 147, 153 (1890). Accord, *Brown* v. *Glines,* 444 U.S. 348 (1980).

This consideration applies even where the issue is not military discipline in the strict sense. *United States* v. *Lee,* 400 F.2d 558 (9th Cir. 1968). What, in reality, is sought to be avoided is the general judicial intrusion into the area of military performance. See *Mattos* v. *United States,* 412 F.2d 793 (9th Cir. 1969); *Callaway* v. *Garber,* 289 F.2d 171 (9th Cir. 1961), cert. denied, 368 U.S. 874. In *Henninger* v. *United States,* 473 F.2d 814 (9th Cir. 1973), the plaintiff had elective surgery just prior to being released from service. He argued that since the operation was performed after he had been processed for discharge, permitting him to sue for injuries incurred during its course could not have the undesirable consequences feared by the Supreme Court. The circuit court rejected this argument, stating:

"To determine the effect that a particular type of suit would have upon military discipline would be an exceedingly complex task, as Henninger concedes. The proximity of the injury to discharge would be only one factor. Whether it resulted from an allegedly negligent order would be another. Whether it was caused by totally unrelated military personnel would be yet a third. In short, nearly every case would have to be litigated and it is the suit, not the recovery, that would be disruptive of discipline and the orderly conduct of military affairs. . . . This is a classic situation where the drawing of a clear line is more important than being able to justify, in every conceivable case, the exact point at which it is drawn. This is especially so because servicemen injured incident to their service are entitled to Veterans' benefits. We hold that *Feres* absolutely bars Federal Tort Claims actions by servicemen injured 'while on active duty and not on furlough . . . due to the negligence of others in the Armed Forces.' " Ibid. at 815-816 (citations and footnotes omitted). See also *Bailey* v. *Van Buskirk,* 345 F.2d 298 (9th Cir. 1965); *Camassar* v. *United States,* 400 F. Supp. 894 (D. Conn. 1975) *aff'd.,* 531 F.2d 1149 (2d Cir. 1976); *Knoch* v. *United States,* 316 F.2d 532 (9th Cir. 1963).

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[2] In addition to compensation for personal injury, it is worthy to note that the American servicemember has a plethora of other remedies available to seek equitable and criminal relief for grievances. For example see: 10 U.S.C. §§938, Complaint of Wrongs; 10 U.S.C. §§801 *et seq.,* Uniform Code of Military Justice; United States Navy Regulations, Paragraph 1107, Interview With Commanding Officer (Request Mast); United States Navy Regulations, Paragraph 1106, Redress of Wrong Committed By a Superior; Marine Corps Order P5354.1, 8 Nov. 1976, Equal Opportunity; Marine Corps Order 5300.10, 4 Feb. 1981, Sexual Harassment.

The third policy consideration, the federal nature of the relationship and the absence of analogous private liability, led the *Feres* court to conclude that a serviceman's suit failed to state a claim under the Tort Claims Act language which provides, "The United States shall be liable in the same manner and to the same extent as a private individual in like circumstances." 28 U.S.C. § 2674. On this point the Supreme Court in *Feres* states:

"Nor is there any liability 'under like circumstances,' for no private individual has power to conscript or mobilize a private army with such authorities over persons as the government vests in echelons of command."—340 U.S. at 141-142.

"Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law. We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence. We cannot impute to Congress such a radical departure from established law in the absence of express congressional command."—Ibid. at 146.

An analogy to various state workmen's compensation statutes which precludes suit by covered workers injured in the course of employment also comes to mind. *United States* v. *Lee*, 400 F.2d 558 (9th Cir. 1968).

The Supreme Court in *Feres* recognized the relationship existing between the United States and its military personnel as one "distinctively federal in character" in that the application of local law to that relationship by virtue of the Tort Claims Act would be completely inappropriate. 340 U.S. at 143. 28 U.S.C. § 1346(b). The fact that the geography of the injury should select the state law to be applied "makes no sense and is unfair to the soldier who has no choice as to his location, particularly because of wide variances in local law." *United States* v. *United Services Automobile Association*, 238 F.2d 364 (8th Cir. 1956). This is particularly so for the individual soldier who is a prospective defendant in a tort case as well as for the United States itself.

Mr. Chairman, we submit that the policy considerations outlined above are just as valid today as when first articulated. Indeed with suits against the government and individual federal officers increasing in numbers every year, the rationale for the Feres doctrine appears to have been fortuitously prescient.

## STATUS OF THE LAW

The Feres doctrine has been broadly applied over the years in situations embracing all facets of military activity including medical malpractice, *Hall* v. *United States*, 451 F.2d 353 (1st Cir. 1971); recreation, *Hass* v. *United States*, 518 F.2d 1138 (4th Cir. 1975); voluntary service, *Charland* v. *United States*, 615 F.2d 508 (9th Cir. 1980); radiation, *Lombard* v. *United States, et al.*, 530 F.Supp. 918 (D. D.C. 1981); chemical warfare testing, *Schnurman* v. *United States*, 490 F.Supp. 429 (E.D. Va. 1980); *Stanley* v. *Central Intelligence Agency*, 639 F.2d 1146 (5th Cir. 1981); on-base activity, *Miller* v. *United States*, ——— F.2d ——— (8th Cir. 1981). Nor has the doctrine been limited to negligence actions. The courts have uniformly applied the *Feres* rule to bar recovery for interconnected intentional torts. *Calhoun* v. *United States, et al.*, 475 F.Supp. 1 (S.D. Cal. 1977), *aff'd.*, 604 F.2d 647 (9th Cir. 1979); *James* v. *United States*, 358 F.Supp. 1381 (D. RI 1973), *aff'd.*, 530 F.2d 962 (1st Cir. 1976), *cert denied*, 429 U.S. 998; *Rotko* v. *Abrams*, 338 F.Supp. 46 (D. Conn. 1971), *aff'd.*, 455 F.2d 992 (2d Cir. 1972); *Gamage* v. *United States*, 217 F.Supp. 381 (N.D. Cal. 1962); *Birdwell* v. *Schlesinger*, 403 F.Supp. 710 (D. Colo. 1975); *Levin* v. *United States*, 403 F.Supp. 99 (D. Mass. 1975); *Citizens National Bank of Waukegan* v. *United States*, 594 F.2d 1154 (7th Cir. 1979). In *Rotko, supra*, the parents of a soldier killed in Vietnam sued the United States and several individual military officers alleging that his orders to engage in the Vietnam conflict were illegal, *ultra vires* and violative of the Constitution. When faced with *Feres*, the plaintiffs asserted that the *Feres* doctrine was not intended to cover instances of "illegality" but only instances of negligence. The court responded:

"The plaintiff's attempts to limit the *Feres* doctrine to negligence actions is rejected. The reasoning of the Supreme Court clearly indicates that it is the status of the claimant as a serviceman rather than the legal theory of his claim which governs in such cases."—338 F.Supp. at 47.

In the *Citizens National Bank* case supra, injuries arising out of the alleged intentional torts of military correctional officers were held to be barred by *Feres*.

The courts have also applied the rule to cases arising out of alleged violations of constitutional rights. In *Misko* v. *United States*, 453 F.Supp. 513 (D. D.C. 1978), aff'd., 593 F.2d 1371 (D.C. Cir. 1979), a National Guard officer sued the United States and Army medical officers alleging that he had been administered drugs and confined in any Army hospital against his will in violation of the Fifth Amendment to the Constitution. Judge Sirica explicitly held that *Feres* applied to a suit asserting tortious injury arising out of infringement upon a constitutional right. The court held that characterization of the claim in constitutional terms made no difference with respect to the *Feres* doctrine stating that, "any other result would mean that the *Feres* based immunity of Armed Forces medical officers could be abrogated through an exercise in pleading." 453 F.Supp. at 515. Similar rulings have been made in *Birdwell* v. *Schlesinger,* 403 F.Supp. 710 (D. Colo. 1975); *Rotko* v. *Abrams,* supra; and in *Calhoun* v. *United States,* supra. Most recently, the Third Circuit Court of Appeals has so ruled in a case asserting constitutional claims against individual federal officers. *Jaffee* v. *United States, et al.,* 663 F.2d 1226 (3rd Cir. 1981).

The *Jaffee* case also reflected the fact that it has been consistently held that the *Feres* doctrine applies to and protects individually named defendants sued outside of the parameters of the Federal Tort Claims Act. *Tirrill* v. *McNamara,* 451 F.2d 579 (9th Cir. 1971); *Rotko* v. *Abrams,* 338 F.Supp. 46 (D. Conn. 1971) aff'd., 455 F.2d 992 (2nd Cir. 1972); *Mattos* v. *United States,* 412 F.2d 793 (9th Cir. 1969); *Bailey* v. *Van Buskirk,* 345 F.2d 298 (9th Cir. 1965); *Callaway* v. *Garber,* 289 F.2d 171 (9th Cir. 1961); *Bailey* v. *DeQuevedo,* 375 F.2d 72 (3rd Cir. 1967), cert. denied, 389 U.S. 923; *Misko* v. *United States, et al.,* 453 F.Supp. 513 (D. D.C. 1978), aff'd. 593 F.2d 1371 (D.C. Cir. 1979); *Birdwell* v. *Schlesinger,* 403 F.Supp. 710 (D. Colo. 1975); *Martinez* v. *Schrock,* 537 F.2d 765 (3rd Cir. 1976); *Roach* v. *Shields,* 371 F.Supp. 1392 (E.D. PA. 1974); *Adams* v. *Banks,* 407 F.Supp. 139 (E.D. VA. 1976); *Calhoun* v. *United States,* supra.

There have been some attempts in recent years to erode the doctrine. In *Thornwell* v. *United States,* 471 F. Supp. 344 (D. D.C. 1979), a United States District Court rules that there was a narrow exception for cases involving intentional torts committed in the service followed by negligent failure to warn or treat after release from the service, the latter portion of the wrong being actionable. For the most part the case has not been followed and has even been criticized as posing an unworkable formula. See, *Schnurman* v. *United States,* 490 F. Supp. 429 (E.D. VA 1980); *Stanley* v. *Central Intelligence Agency,* supra., and *Sweet* v. *United States,* 528 F. Supp. 1068 (D. S.D. 1981). Also, in the recent case of *Wallace* v. *Chappell,* 661 F.2d 729 (9th Cir. 1981), a panel of the Ninth Circuit Court of Appeals erroneously refused to apply the *Feres* doctrine to a *Bivens* suit by several Navy enlisted men filed personally against a number of officers alleging discrimination. The court relied largely upon equitable relief cases in its analysis. A petition for certiorari is being considered.

In addition to the above decisions, the Subcommittee should be aware of the fact that the Supreme Court has ruled that third-party actions against the United States are also barred. *Stencel Aero Engineering Corporation* v. *United States,* 431 U.S. 666 (1977). A third party action is one where the original defendant in a case, in turn, sues a party who was not sued by the planitiff asserting that the additional party is really responsible for the plaintiff's injuries. The court in *Stencel* held that the same policy reasons for the *Feres* rule apply to third-party actions filed against the United States. The court stated:

"To permit petitioner's claim would circumvent this limitation, thereby frustrating one of the essential features of the Veterans' Benefits Act. As we stated in a somewhat different context concerning the Tort Claims Act: 'To permit [petitioner] to proceed . . . here would be to judicially admit at the back door that which has been legislatively turned away at the front door. We do not believe that the [Federal Tort Claims] Act permits such a result. *Laird* v. *Nelms,* 406 U.S. 797, 802 (1972).'"—431 U.S. at 673.

Were that held not to be the case the protections intended to be afforded by the doctrine would be lost through the device of the third-party suit.[3]

The *Stencel Aero* decisions confirms the soundness of the *Feres* doctrine. In *Stencel Aero,* the Supreme Court recognized that "[t]he relationship between the Government and its suppliers of ordnance is certainly no less 'distinctively federal in character' than the relationship between the Government and its soldiers." 431 U.S., at 672. Trial of tort claims filed by military contractors against the United States founded upon the alleged acts or omissions of military personnel would "involve second-guessing military orders and would often require members of the Armed Services to testify in court as to each other's decisions and actions. This factor, too, weighs against permitting" suits. Ibid., at 673. We believe that these important considerations point to the conclusion that, just as *Feres* itself is an essential doctrine necessary to maintain the fabric of our national defense intact, *Stencel Aero* is an integral part of the doctrine, even aside from its substantial impact in "setting an upper limit of liability for the Government . . ." Ibid. Thus, *Stencel Aero* confirms the soundness of *Feres* and its importance to the jurisprudential development of tort law involving the United States.

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[3] In a recent case in the Fourth Circuit Court of Appeals, that Court, in a mutual fault, admiralty ship collision case, refused to apply *Feres* to the allocation of damages among the parties for injuries incurred by some servicemen. This may be viewed as inconsistent with the *Stencel* ruling. A petition for a writ of certiorari is being considered. *Ionian Glow Marine, Inc.* v. *United States,* 670 F.2d 462 (1982).

In conclusion, it is the view of the Department of Justice that the *Feres* doctrine is a sound and necessary rule of immunity which permits the Armed Services to be free to go about their mission of defending the country. At the same time, the remedies available as an alternative to lawsuits which we have previously outlined provide a means for meaningful redress and compensation for those who are injured in the course of military service. On the whole, the totality of the existing scheme appears to provide an equitable, consistent and workable system.

### RELATIONSHIP TO PRIVATE RELIEF LEGISLATION

For many of the reasons stated above, particularly that of alternative statutory or regulatory compensation being available, private relief legislation would usually not be appropriate or necessary. Moreover, plaintiffs who cannot seek a judicial remedy because of the existence of a valid and salutary rule of law should not normally be permitted to shop in a different forum, the Congress, and cause the expenditure of legislative resources properly intended and organized to deal with broader public issues than individual relief cases. By the same token a general doctrine designed for the greater good, such as *Feres,* will occasionally work an egregiously inequitable result in an individual case. For the very few cases of this nature that arise, Congress can provide a valuable safety mechanism through the option of private relief.[4] Thus the Department of Justice would recommend that the Congress continue to administer the private relief mechanism with a view toward reinforcing the *Feres* doctrine, the reasons behind it and the general principle of not permitting collateral efforts by litigants to avoid proper judicial decisions. At the same time, enough flexibility should be retained to recognize the rare case where relief is truly warranted.

Senator **Grassley**. Our next witness is Mr. John H. Thompson, Deputy Assistant General Counsel of the Veterans' Administration.

Mr. Thompson, I would like to welcome you to this meeting as I did privately, and to thank you once again publicly for appearing before us today. We are most interested in hearing the opinion of the VA on this matter.

I would ask you to proceed and also ask you to introduce the people with you, as well as for me to remind you that your entire statement will be printed in the record if that is what you desire, and I am sure you do, and that you will want to summarize.

Thank you very much.

## STATEMENT OF JOHN H. THOMPSON, DEPUTY ASSISTANT GENERAL COUNSEL, VETERANS' ADMINISTRATION, ACCOMPANIED BY MARY BELL AND DOUGLAS BRADSHAW, OFFICE OF GENERAL COUNSEL

Mr. **Thompson**. Thank you, Mr. Chairman.

With me this morning, I am pleased to say, are Mary Bell and Mr. Douglas Bradshaw, both of whom are colleagues of mine in the Office of General Counsel.

Senator **Grassley**. I thank your colleagues for coming.

Mr. **Thompson**. We would prefer that our complete statement be submitted for the record. I would like to add just a few comments about it before we address your questions.

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[4] An example occurred in the 96th Congress where a unique factual setting led to Private Law 96-77 for the relief of James R. Thornwell. In the course of an espionage investigation, he had been intentionally imprisoned and mistreated for several weeks and then surreptitiously administered the drug LSD all of which resulted in severe and permanent injuries.

Veterans of the Armed Forces are special people, and I guess no one knows that better than we at VA. Fittingly, there are many special Federal programs to benefit them. Where service has resulted in injury or death, a tremendous national obligation is owed them or their survivors. We describe this national response, our Federal veterans' programs, in our prepared statement.

Those who wish to weigh the relative worth of these benefits against some alternative tort remedy would do well to look very closely. Our disability compensation program is virtually no-fault. It results in timely claim adjudication, without need for attorney services. Tax-free payments are made in monthly installments that correspondingly grow or contract as the actual level of disability changes. It is not necessary that we speculate as to the longevity of an individual or the course the disability will take, as is required in setting lump sum awards for lost future earnings. Our tax-free payments to the most severely disabled veterans with no dependents can exceed $38,000 per year under current law, regardless of the individual's actual preinjury earning potential.

The companion VA benefit that cannot be overemphasized is our free comprehensive health care for service-related disabilities. Again, bv providing this benefit in kind, we remove the necessity for speculation in computing lump sum awards for future medical expenses. It is a true, precise compensatory approach to meeting the Federal obligation.

One final point before we entertain questions. In assaying the value of the VA's benefits package, certain components should be viewed as virtually irreplaceable. VA specializes in meeting the needs of disabled veterans. We offer expert services in such areas as vocational counseling and rehabilitation and many medical specialties—just as an example, the treatment of spinal cord injuries—that would be difficult, if not impossible, to find elsewhere. Our benefits also include such nontraditional tort award components as home purchase assistance and automobile adaptive equipment services.

In short, we think we have very broad authority to tailor a disability benefits package to an individual's needs.

Senator GRASSLEY. Thank you. Do either one of your colleagues desire to make any statement?

Ms. BELL. No, Senator.

Mr. BRADSHAW. No, thank you, Senator.

Senator GRASSLEY. My questions are fairly elementary, but I think we ought to get them in for the record. You mention in your testimony that the disability compensation is paid at predetermined prescribed rates by law, and is based on the degree of disability. Who determines the serviceperson's disability rating or, in this case, the veteran's disability rating, and who decides whether that injury was service connected?

Mr. THOMPSON. Claims for disability payments are filed with our 58 regional offices around the country. Virtually every State, Puerto Rico, and the Philippines have regional offices. These regional offices have adjudication divisions with persons who specialize in the consideration of these claims for benefits. They will obtain all service medical records and will see that the claimant is examined to determine what his current disability status is and make the determinations accordingly.

If a claimant is dissatisfied that a benefit has not been granted, or has not been granted to the extent he or she desires, there is an appeal mechanism permitting administrative appeals to the Board of Veterans Appeals here in Washington.

Senator GRASSLEY. The last comment involved the appeals process, right?

Mr. THOMPSON. Yes.

Senator GRASSLEY. And that is the full appeals process?

Mr. THOMPSON. Yes. Hearings can be requested and are always granted at any stage of the claim adjudication process, either at the regional office level or at the Board of Veterans Appeals level.

Senator GRASSLEY. The last point that I want to raise, how do compensation and medical care presently afforded servicemen under the Veterans Benefit Act compare with compensation that might be awarded under the Federal Tort Claims Act, should the Feres doctrine be waived?

Mr. THOMPSON. I think it is very difficult to generalize as to whether veterans as a whole would come out better under the Federal Tort Claims Act. Court awards can vary so much from State to State, and the nature of the VA and tort remedies are so different in design.

However, two of the major universal components of awards for disabling injuries are loss of earnings and special medical expenses. Regarding loss of future earnings, I believe ours is in many respects a more precise remedy. We need not speculate as to how long a veteran or his surviving spouse will live. Payments continue until death, and disability payments increase if the level of disability does.

By not receiving lump sums, beneficiaries are assured of maintenance payments for life. Studies of tort award recipients show many lump sum awards are dissipated within a few years but the recipients 'needs continue, and I think that is an advantage to our approach.

Senator GRASSLEY. I need to back up. In your discussion of the appeals process, one of the things I neglected to say, but that I wanted to get on the record, was the extent to which the appeals process is available to an injured living veteran as opposed to a service person who was killed or who has died, and is that appeals process available for survivors?

Mr. THOMPSON. Yes, it is available in both cases. And the appeal would involve a de novo review of the entire record. That is, the Board would look afresh as though the regional office had never considered the claim.

Senator GRASSLEY. Would you guess that veterans' benefit compensations would be altered if the Feres doctrine were waived and military personnel were allowed to sue the Government under the Federal Tort Claims Act, and if so, to what extent? I know that is a supposition, but I guess you probably have thought of that within your Department or someplace in the councils of Government.

Mr. THOMPSON. Yes. I would think that the Government, were it to amend the current system, would wish to prevent double recovery, which I suppose would entail, if a tort award is made, doing away with eligibility for VA benefits based upon the same injuries. One approach might be to have eligibility for VA benefits terminate once an award is made and to have that ineligibility continue until the value of the tort award equals the value of the VA benefits foregone during the same period. It would be quite an awkward thing to administer, obviously. I would think that some set-off of that kind would be required.

Senator **Grassley**. Now, on the one hand, we have those who want to change the Feres doctrine, who would admit that access to the compensation program is adequate, but they might at the same time be saying that the compensation under that program is unsatisfactory. So my question is whether there are channels or arenas other than a tort suit in the Federal courts that are more appropriate for airing those complaints.

Mr. **Thompson**. It seems to me that those who argue that VA benefits are inadequate are arguing perhaps less for an amendment to the Federal Tort Claims Act than for more generous VA benefits across-the-board, for both negligent and nonnegligent injuries. It seems to me that the Congress is very well equipped to deal with questions of adequacy of VA benefits. The Veterans' Affairs Committees in both Houses take their oversight responsibilities very seriously. Our programs are amended virtually yearly and keep pace with changing economic conditions. Rates of payment of compensation have been increased each year for the past 8 years to keep pace with inflation and in fact have outstripped the effects of inflation, have kept pace very well. So I believe I would say to those persons that while the VA benefits programs certainly can always stand a lot of examination, I think amending the Federal Tort Claims Act is not the way to improve veterans' benefits.

Senator **Grassley**. Those are all the questions I have. Thank you very much, Mr. Thompson, and your associates. I would like to thank you all for helping us arrive at a decision on this particular bill, and if you have anything additional that you want to submit, the record will be open for a few days.

Thank you very much.

Mr. **Thompson**. Thank you very much.

[The prepared statement of Mr. Thompson follows:]

## PREPARED STATEMENT OF JOHN H. THOMPSON

Mr. Chairman and Members of the Committee:

I am pleased to appear before you today to discuss the exemption from the provisions of the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680, of injuries sustained incident to military service. This exemption is known as the Feres doctrine because it was first enunciated in Feres v. United States, 340 U.S. 135 (1950).

I will defer to the other Administration witnesses on the major justifications for the Feres doctrine and any possible effects of legislative action to alter or eliminate it.

My purpose in appearing before you today is quite limited. As my colleagues from the Departments of Justice and Defense have testified, one of the rationales of the Feres doctrine is the existence of a compensation and medical care system which is already in place and which now serves as the exclusive Federal remedy for injuries incident to service. We believe it may be helpful for the Subcommittee to have these benefits described for the record.

In keeping with the focus of this hearing, my remarks will presuppose negligent injury in service, although the element of causation is not generally in issue for Veterans Administration (VA) purposes. So long as an injury is not the result of a veteran's willful misconduct, such as accidental injuries sustained while operating an automobile under the influence of alcohol, and is incurred in line of duty in a period of active service for which a discharge or release is under conditions other than dishonorable, compensation may be paid. 38 U.S.C. §§ 101(2), 105, 310.

Congress has historically and fittingly provided monetary benefits for those who sustained disability or gave their lives as the result of service to their country. Disability compensation for service-incurred disabilities is paid at statutorily prescribed rates according to the percentage rating of the disability or combined disabilities. The current monthly payment rates for unmarried veterans range from $58 for a disability rated 10 percent to $1,130 for a disability rated 100 percent. 38 U.S.C. § 314(a)-(j). Disabilities which are extremely incapacitating are compensated under provisions for special monthly compensation in lieu of or in addition to the percentage rates. 38 U.S.C. § 314(k)-(t). The maximum payment for the most severely disabling condition is $3,223 monthly. Additional amounts are paid if the veteran has dependents and has a disability rated at 30 percent or more. 38 U.S.C. § 315. Surviving spouses of those veterans whose deaths occurred after a prescribed period of service connected, total disability or whose deaths were service connected are entitled to a monthly stipend determined according to the veteran's rank in service and the number of dependents. 38 U.S.C. §§ 410, 411. An adjudication of "service connection" and assignment of a compensable evaluation for a disability determined to be an employment handicap entitles a veteran to education benefits designed for vocational rehabilitation under chapter 31 of title 38, United States Code. Certain dependents of veterans with service connected, total disabilities or survivors of veterans whose deaths were service connected are themselves eligible for education benefits under chapter 35 of that title. In addition to the monetary benefits just described, a veteran is entitled to priority medical treatment for service-connected disabilities in the extensive Veterans Administration medical care system. 38 U.S.C. §§ 610, 612(i). Certain surviving spouses and dependents, described above, are also eligible for reimbursement of health care expenses through the Civilian Health and Medical Program of the VA (CHAMPVA). 38 U.S.C. § 613.

Having given you that general background, let me offer some hypothetical examples of how the VA benefits system operates. Let us assume that a 24-year old soldier who is married and has two young children is tragically injured through the negligence of a fellow service member. The soldier sustains a spinal cord injury and is paralyzed below the waist. After initial treatment at a military medical facility he is honorably discharged. Before his discharge, an application for compensation from the VA has been filed.

Upon receipt of the claim and the veteran's service medical records showing the accident and treatment in service, VA personnel grant service connection for the veteran's injuries and rate them according to the rating schedule at 38 C.F.R. Part 4. Complete paralysis of the nerves controlling ambulation would be rated 100% disabling. Because of loss of use of the lower extremities and the need for assistance, known as "aid and attendance," occasioned by the severity of his injuries, he would be eligible for special monthly compensation under 38 U.S.C. § 314(m). The current monthly rate of compensation would be $1,547. He is also entitled to an additional $153 monthly on account of his wife and children and to an annual clothing allowance of $305. 38 U.S.C. §§ 315, 362.

Obviously a person with such a severe disability will need some assistance in readjusting to civilian life. This veteran may find, because he is confined to a wheelchair, that he can no longer ride in the family car or navigate in his home. He is eligible for a one-time grant of $4,400 toward the purchase of a suitable automobile and the VA will provide necessary adaptive equipment, such as hand controls and a wheelchair lift, so that he can operate it safely. 38 U.S.C. § 1902. The VA will replace or reinstall this equipment in subsequent cars which the veteran may own. Like most other veterans, this one will be eligible for a VA guaranteed home loan under chapter 37 of title 38, United States Code. He is additionally eligible, because of restrictions on his locomotion, for a grant of up to $32,500 to construct or remodel one housing unit with special features or equipment to make it accessible for a wheelchair-bound person. 38 U.S.C. § 802. The home is covered by mortgage protection life insurance under a group policy purchased by the Administrator, up to a maximum of $40,000, for which the veteran pays standard rates and the VA assumes the extra premium cost associated with the veteran's disability. 38 U.S.C. § 806.

The veteran's disabilities preclude many types of employment and he would accordingly want to obtain vocational rehabilitation. The highlights of this comprehensive program include counseling and assistance in selecting a vocational goal, the formulation of an individualized written plan of vocational rehabilitation, a subsistence allowance, and placement assistance. 38 U.S.C. §§ 1500-1521. If the veteran's goal can be achieved by pursuing full-time study at a college, his subsistence allowance would be $441 monthly and the VA would pay his tuition and fees.

The veteran could also provide for his family by taking advantage of several insurance programs. Like others in service, he was covered by $35,000 of Servicemen's Group Life Insurance under a group policy held by the Administrator. This coverage would remain in effect for one year following his discharge and could then be converted to Veteran's Group Life Insurance, which is five year term coverage. 38 U.S.C. §§ 766, 767. At the end of the term, the policy is convertible to an individual policy of life insurance without medical examination. 38 U.S.C. § 777. The veteran may also apply for Service Disabled Veterans Insurance, in the amount of $10,000. Premiums thereon would be waived because of his total disability. 38 U.S.C. §§ 714, 722. Thus, the veteran would be assured of $45,000 of life insurance at a reasonable cost, in addition to the mortgage insurance previously mentioned.

Due to the severity of his injury, the veteran would undoubtedly need medical care from time to time. This could be obtained free of charge, on either an inpatient or outpatient basis at a VA Medical Center as necessary, or if he needed extended care, his treatment in a nursing home or home health care services could be arranged. 38 U.S.C. §§ 610, 612. His wheelchair would be furnished by the VA. 38 U.S.C. §§ 612, 601(6)(a). His wife and children would be eligible for reimbursement of medical expenses. 38 U.S.C. § 613. Under these provisions, the veteran need have no concern about his financial ability to obtain medical care.

Another hypothetical would be a negligent in-service injury which results in the post-service death of the veteran. We will assume that, as the result of negligent medical treatment, a 45-year old married woman who had attained the rank of E-9 is rendered comatose. She is discharged from service and immediately transferred to a VA Medical Center where she remains in a coma for one month. Upon her death, the funeral home is reimbursed $1,100 for funeral and burial expenses. 38 U.S.C. § 907. Her husband and two teenage children begin receiving Dependency and Indemnity Compensation (DIC) benefits of $663 monthly. 38 U.S.C. § 411. Having been reduced from a two-income to a one-income family, her husband realizes that he will need to upgrade his occupational skills to offset the lost income. He contacts the VA, receives vocational counseling, and enrolls in college full time; he receives $342 monthly in educational benefits under chapter 35 of title 38, United States Code. 38 U.S.C. § 1701. In order to be closer to the college, he purchases a home there using a VA guaranteed loan. 38 U.S.C. § 1801. Shortly thereafter, the older child sustains an injury and has costly medical treatment reimbursed by the VA. 38 U.S.C. § 613. When the children reach the age of 18, each becomes entitled to DIC in his own right, and their father's award would be reduced to $567 monthly. However, both are good students and each elects to receive educational assistance of $342 monthly to attend college full time in lieu of DIC. 38 U.S.C. §§ 1701, 1762. The remainder of their expenses are paid from the $45,000 life insurance left by their mother and invested for them. 38 U.S.C. §§ 722(b), 767.

The veteran's aged mother, who lives alone and whose annual income of $2,400 is not enough to make ends meet, receives $107 monthly in parents' dependency and indemnity compensation benefits. The amount of this benefit would decrease if her income increased, would be minimal if her income exceeded $3,600, and would be terminated if her income exceeded $5,642.

As I have hoped to illustrate by these examples, the VA benefits provided by Congress are more than income replacement. They are designed to fill the wide spectrum of needs experienced by veterans and their families in adjusting to the loss occasioned by service-incurred disability or death. The services which are available in the context of the VA's programs, such as vocational counseling, job placement, and housing assistance, are clearly of substantial value to the targeted beneficiaries.

We believe that the benefits administered by the VA--and I hasten to point out that I have not even touched on the benefits of other agencies, such as the Armed Forces' death gratuity or benefits from the Social Security Administration--are an adequate remedy for instances of in-service negligence. We believe they are, in fact, superior to an alternative tort remedy in some respects. The speed and convenience of an administrative system, in our view, have a significant advantage over the delays and uncertainties inherent in a tort recovery system. In most cases a claim for VA benefits would be filed before discharge and there would be little, if any, difficulty in substantiating the claim through service records, since only the injury and its origin in service need be established. Processing time would accordingly be kept to a minimum and monetary benefits could begin in a matter of weeks. The veteran or the veteran's family would have the full benefit of these payments because services of a lawyer would not be needed. A large component of tort damages where there has been a severe injury is past and future medical expenses. With the guarantee of medical treatment, even costly long-term nursing home care, for service-connected disabilities, the financial ability to obtain appropriate care is removed as a source of concern for veterans and their families.

The short and long-term advantages of the comprehensive veterans' benefits program are such that we strongly urge that these benefits remain the exclusive remedy for any injuries incurred in service. Our highest mission is to serve all veterans disabled in service and the survivors of those whose deaths were due to service, regardless of whether negligence was the cause. The *Feres* doctrine confines to us that mission, one we shoulder willingly and expertly. Should the current system be altered by legislation, a mechanism to offset VA benefits from any tort recovery would be necessary in order to avoid assessing the Treasury twice for the same injury.

Senator GRASSLEY. Our final witness today is Mr. William H. Taft IV, General Counsel for the Department of Defense.

Mr. Taft, I would like to welcome you and thank you for your appearance here today. I understand that the Department of Defense has a particular interest in this matter. We are most interested in your views, and appreciate your coming to share those with us.

If you have anybody that you want to have come to the witness table with you, we would like to have them introduced.

## STATEMENT OF WILLIAM HOWARD TAFT IV, GENERAL COUNSEL, DEPARTMENT OF DEFENSE

Mr. TAFT. No, thank you, Mr. Chairman. I will try to take the questions as best I can.

Senator GRASSLEY. Your entire statement will be printed in the record, and if you would just summarize, we would appreciate it.

Mr. TAFT. Thank you very, much, Mr. Chairman.

I am very glad to be here today. I welcome the opportunity to have my statement printed in the record. Largely, it covers the same ground as the statement of the Justice Department, and I associate myself with the remarks and position that Mr. Bonds took in his earlier testimony.

Just very briefly, I would like to say that I think, with respect to the Feres doctrine, there is no question at this point that, as a matter of statutory construction, the *Feres* case was correctly decided. It has stood for 30 years, and the Congress has accepted it during that period of time, and I think it clearly states the intention of the Congress in the enactment of the Federal Tort Claims Act, that intra-service lawsuits were not to be permitted under that statute.

The policy behind the *Feres* case identified by Mr. Justice Jackson in the opinion essentially involved three considerations. The bringing of suits would have a debilitating and deteriorating effect on military discipline; second, there was in existence at that time, and is today, a uniform and comprehensive system of statutory compensation and benefits which was available to members and dependents or survivors of servicemen injured incident to their service; and finally, the desirability of a uniform system of compensation which the veterans' benefits and military benefits system provides, which the Federal Tort Claims Act process would not provide to the servicemen if they were expected to bring lawsuits under that system.

I think these considerations identified cogently by Mr. Justice Jackson in 1950 are valid today. There is nothing different in the requirements that are imposed on our military today from what they were in 1950. We still require the same amount of discipline, and we still have the same comprehensive system of benefits, and we still desire to treat our servicemen uniformly throughout the armed services, regardless of the State in which they might happen to be assigned on duty.

The general system, I think, has worked well over the years in which it has been in place. It is essentially a workmen's compensation system. The principal benefit of it is the certainty of compensation without regard to fault for the serviceman in an identified, clear amount if he is injured incident to service.

It is possible—and I think it would be true of any such general system, as you pointed out in your opening statement—that exceptional cases do not fit well within it. We need to be alert in the exceptional case to that possibility and to consider each such exceptional case, the facts that are involved in it, and see if injustice will be the result if we simply doctrinarlly apply the general system to that case. Identifying such exceptional cases is probably one of the most difficult responsibilities that your committee has, I know, and that others working with you must have. But it is one that obviously, it is our duty to perform.

In terms of identifying the exceptions, I would make only one additional point, and that is that in identifying exceptions to the general rule, obviously, it is most important for the facts of each case to be available to those who have the responsibility for deciding whether an exception is warranted. The facts of each case will be determinative. I think that in the case of the Days that you have been discussing this morning, the tragic death of Seaman Charles Day, we must—and to the extent that we have not, we will—provide to the subcommittee and to the Days all of the facts that they might request and that the subcommittee might require to make the judgment as to what should be done in this particular case. I can pledge you my efforts to obtain all of that information and provide it to the committee and to Mr. and Mrs. Day.

Senator GRASSLEY. Is that information classified?

Mr. TAFT. I am not aware that any of it that would be necessary for knowing the necessary facts is classified. I would have to look at it and see if it is classified, and then we would see what we could do. But initially, things such as medical records and personnel service records are not classified.

Senator GRASSLEY. Are these going to be made available to the Days, then, or are you saying they have been?

Mr. TAFT. To the extent that they have not been, they will be. That is my undertaking here. I just heard of this case yesterday. I heard that there was some suggestion that not all requests for information had been met. I think they should be, and they will be.

Senator GRASSLEY. Well, I appreciate that, and from your position within the Defense Department, I know that you will be in a position to deliver on those statements.

I guess just my personal opinion in regard to the inability to get information like presumably they could not get, just leads to general suspicion on the part of the average citizen.

Mr. TAFT. I agree.

Senator GRASSLEY. Now, we can all understand why things that are directly related to the national security obviously can be classified but particularly in the case of an individual's private medical records—it is just beyond comprehension that those things would be related to the national security. And I am sure that it is just the general bureaucratic inertia that has kept these people from getting that information, and maybe a lot of other constituents, as well. And part of our function within government, obviously, is to give people reason to have credibility in Government. That is what participatory democracy is all about. And for those people whom the Days have had to deal with who have used the excuse of the inability to give the information, they just cause not only the Days, but other people as well, to lose confidence in government, and we have to build that up. And in these particular instances, the burden of proof ought not to be on the Days why that information should be available; it ought to be on the part of those who say it is not. I appreciate that very much, and I am sure the Days do, as well, so I do not suppose I should belabor that anymore. But you bring good news to me, and hopefully to them, so I will not have to pursue some questioning that I had along that line.

Mr. TAFT. Well, we are on the same side on that, and we will make available whatever information they require that we have.

Senator GRASSLEY. I know that my first question again is probably elementary, but I want to have an opportunity to bring these things out—in the record—what are the procedures that are available to service personnel to insure that they are treated responsibly and with due care.

Mr. TAFT. You would like to know the procedures that are available?

Senator GRASSLEY. Yes.

Mr. TAFT. There are, of course, a number of procedures available to them. Some of them were mentioned by the people from the Justice Department, Mr. Bonds and his colleague. It is open to any serviceman or servicewoman to bring a complaint against a commanding officer or against another member of the service, and such a complaint would be investigated by a third party, an impartial party, and would be vigorously investigated.

The inspector generals of each of the three services have the responsibility with respect to claims affecting discipline and the readiness of the force. There are also, of course, other investigative units available for criminal sorts of charges and others for financial misdealings. We have to some degree also these systems available at the office of the Secretary of Defense, in our Office of Review and Oversight, which has a hot-line and is ready, also, to look into matters that anybody would wish to complain about. We do look into them, and it is one of the ways in which we, I think, keep our forces in the condition of readiness that we do.

Senator GRASSLEY. You mention in your testimony that the Supreme Court has acknowledged the unique nature of the law on the one hand and the military demands on the other, and it has been stated by the Supreme Court that, "The fundamental necessity for the imposition of discipline may render permissible within the military that which would be constitutionally impermissible outside it." Is the Feres doctrine unique in its special treatment of military personnel?

Mr. TAFT. Well, the Feres doctrine, I think, is itself essentially statutorily based. It originates in the concept of sovereign immunity, which is waived only to the extent that the Congress chooses to waive it by statute. I think that the Congress could waive sovereign immunity in the intraservice suits. I think it is equally clear that it chose not to do so. There would be no constitutional bar to permitting a suit by a serviceman under the Federal Tort Claims Act, in my judgment, if that were the way that the Congress desired to go.

They did not desire to go that way. We do not recommend it. But it is a statutory policy, not a constitutional one.

Senator GRASSLEY. You mentioned that the disastrous effect of potential lawsuits in a military environment can be readily understood. For the record, could you give us some more specific effects that might arise from no more than the threat of a lawsuit?

Mr. TAFT. Well, I think that it is necessary in the military environment, as perhaps it is not in the civilian one, that orders be given by the superior officers with confidence that they will be carried out; that ratings of performance of subordinates be candid and represent the best judgment of the officer doing the rating, so that people who are promoted, or demoted, or fail to be promoted, that this is done on the basis of the merits of that individual as perceived by their commanding officer. If that commanding officer, in carrying out these responsibilities, is apprehensive about the possibility of a lawsuit that would be brought against him for issuing an unwise order or for giving a poor rating, I think it is inevitable that in certain cases, the judgment of that officer will be colored by the possibility of the suit. He could be discouraged from ordering or rating the individual subordinate officer or subordinate serviceman correctly, and if he did it incorrectly or hesitated to issue orders because he was concerned about this, the operations of the force would be jeopardized, and not just of the commanding officer or of the individual serviceman receiving the officer, but of a whole unit, and so forth.

Senator GRASSLEY. This subcommittee recently held hearings on the constitutional tort claims or *Bivens* actions brought under the Federal Tort Claims Act. In those hearings, it was well established that the specter of personal liability chilled effective decisionmaking by Government employees. Would it be unreasonable to assume that the *Wallace* decision recently handed down by the ninth circuit court might have a similar impact on the military?

Mr. TAFT. I do not think it would be unreasonable to assume that at all, sir. I think that the *Wallace* decision, if it is preserved, will have precisely that effect, and it would be a very unfortunate effect. We are discussing with the Department of Justice, as I included in my prepared statement, what course of action we are going to pursue with respect to the *Wallace* case. We may seek certiorari of it. I do not know that we will, but we certainly do not acquiesce in the result. If we did not seek certiorari on it, it would not mean that we thought it was well decided. We would presumably just be seeking a better case to take up than that one, or something of that sort. But we do not agree with the result in that case. We opposed it before it came down, and we lost it, but we adhere to the position we took before the court that it is wrongly decided.

Senator GRASSLEY. One last question—-and it is getting back to the earlier testimony by the Senators on the Days—and again, I do not want to belabor this, but maybe you are in a position where you could answer a question that I asked of the Justice Department, whether you are aware of whether or not the Days have exhausted all administrative remedies in their search for information regarding their son's death and whether or not you have any suggestions for further administrative actions that the Days might utilize.

Mr. TAFT. It is my understanding, and this, of course, is a feature of the system we have, that the benefits to which they might be entitled, they would have obtained automatically. There really, beyond that, is no administrative remedy, because it is not dependent on an identification of fault——

Senator GRASSLEY. Could I stop you, because I did not make my question clear. You are accurate in regard to the benefits, but what about just information that they want?

Mr. TAFT. With respect to information, I understand that they have requested some, that they have been provided some. There is some suggestion, and I have not been able to track this down, that they have asked for some information which has not been provided. That does not take an administrative remedy of any formal sense. To the extent that we have information that they wish that we can provide to them, we will do that. That is the administrative remedy; they have got it today.

Senator GRASSLEY. OK, so that answers the question. I guess I would only implore you that if there is something else available that you will help them get that.

Mr. TAFT. We will certainly do that.

Senator GRASSLEY. OK, thank you.

That is my last question. You have been very responsive. I appreciate it very much. You have appeared before our subcommittee on previous occasions. We want to thank you doubly for the several times that you have returned here. You have been very open with us, and we appreciate that very much. Thank you for your testimony.

Mr. TAFT. Thank you, Mr. Chairman. I am glad to appear before you.

[The prepared statement of Mr. Taft follows:]

## PREPARED STATEMENT OF WILLIAM H. TAFT IV

Mr. Chairman and Members of the Subcommittee:

I appreciate the opportunity to appear before you today to present the views of the Department of Defense on the Feres doctrine on intramilitary immunity. I would like to begin my testimony on this important subject with a brief discussion of the background of the Feres case.

In 1946, after three decades of legislative effort, Congress passed the Federal Tort Claims Act.[1] The primary purpose of the Act was to relieve Congress of the enormous burden created by the thousands of private relief bills seeking money damages for injuries caused by the Federal Government and its employees. Prior to enactment of the FTCA, such bills represented the only means by which an individual injured as a result of a tort on the part of the Federal Government could be compensated, because sovereign immunity blocked civil actions.

The FTCA waives sovereign immunity in broad language. It makes the Government liable for tort claims based on the negligent or wrongful act or omission of any government employee while acting within the scope of his office or employment. This liability is determined "in the same manner and to the same extent as a private individual under like circumstances."[2] There are some specifically enumerated exceptions to this general grant of tort jurisdiction, such as discretionary governmental functions, assault and battery, and claims arising in foreign countries.[3] Although Congress has enacted several specific provisions making the Government the exclusive defendant in certain situations,[4] a plaintiff is generally permitted to sue both the federal employee as well as the United States. There is no provision in the Act expressly permitting or prohibiting the claims of members of the Armed Forces.

Shortly after passage of the FTCA, courts were faced with the issue of the service member's right to sue under the Act. In 1949 the Supreme Court held in the case of United States v. Brooks[5/] that the plain language of the Act did not exclude claims by service members. In Brooks, two brothers, both active duty servicemen, suffered injuries in an automobile accident. They were on military leave and off-base on a public highway when they were struck by a government vehicle. The Supreme Court allowed suit under the Federal Tort Claims Act, but expressly limited its holding to claims that were not incident to the service of a military member. The Supreme Court reserved decision on the "wholly different case" of injuries that are incident to service.[6/]

In Feres v. United States[7/] the Supreme Court faced that "wholly different case." In Feres a widow sued under the Federal Tort Claims Act for the wrongful death of her active duty husband, who died in a fire while he slept in his military barracks. The Court held in a unanimous decision that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."[8/]

The Court focussed, in its opinion, on the language in the statute making the Government amenable to suit "in the same manner and to the same extent as a private individual under like circumstances... ." It concluded that the circumstances of the relationship between a serviceman and the Federal Government are not analogous to those of a private indivudal and that, accordingly, the statute did not create a cause of action in those circumstances. The court reviewed, in the course of its opinion, several policy considerations that argue against giving the serviceman a right of action under the FTCA, and it suggested that only an "express congressional command," which it did not find, would indicate that Congress intended to create such a right in passing the statute. The failure of the Congress to enact legislation modifying the result reached in Feres in the thirty years since it was decided confirms the correctness of the decision and its interpretation of congressional intent.

The major policy considerations that impressed the Court in Feres were:

(1) the effect of such suits on military discipline;

(2) the existence of a uniform and comprehensive system of statutory compensation and benefits available to service members and their dependents or survivors; and

(3) the lack of uniformity of state laws.[9/]

I would like to review these important policy considerations, which originally justified and continue to require the retention of the Feres doctrine.

First, the effect of such suits on military discipline should be considered. It is widely accepted that those in military service are often subjected to orders and regulations that constrain and burden their daily lives. In dealing with areas of the law that are unrelated to the Feres doctrine, but which also involve the unique requirements of military service, the Supreme Court has stated that "the fundamental necessity for obedience, and the consequent necessity for the imposition of discipline, may render permissible within the miltary that which would be constitutionally impermissible outside it" and that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty."[10/]

In the Feres area, the Supreme Court has also recognized the peculiar and special relationship of the soldier to his superiors, the effects of FTCA litigation on the military services, and the extreme results that might obtain if suits under the Act were allowed for negligent orders given, or negligent acts committed, in the course of military duty.[11/] The threat of a lawsuit may depress morale, chill effective action, and burden any public official in executing his duties. The disastrous effect of such potential lawsuits in a military environment can be readily envisioned.

The Feres doctrine is not based on the idea that any particular tort action within the military is dangerous, but rather on the premise that a multiplicity of such suits would affect the military adversely. It is the litigation of suits, not just the recovery of damages, that would be disruptive of discipline and the orderly conduct of military affairs. This brings us to the second policy consideration underlying the Feres doctrine -- the existence of a uniform and comprehensive system of compensation and benefits available as a remedy to service members and their dependents or survivors.

The Congress has not allowed the requirements of military service unjustly to penalize a service member injured incident to his service as a result of the negligence of another military member. Courts have forcefully emphasized that the benefits available under the statutory system established by Congress provide not only adequate and comprehensive coverage, but also compare "'extremely favorably with those provided by most workmen's compensation statutes.'"[12/] These benefits include, but are not limited to, death benefits,[13/] disability compensation,[14/] compensation for dependents,[15/] life insurance at special rates,[16/] and extensive medical care, which encompasses hospitalization, nursing home care, outpatient treatment, and prosthetic devices.[17/] Thus, there are also substantial benefits for dependents or survivors in addition to those granted to the member himself.

I understand that the Veterans Administration will testify in detail about the benefits to which former service members are entitled.[18/] This comprehensive system of benefits serves a dual purpose. It not only provides a swift, efficient remedy for any injured service member, but it also clothes the Government in the "protective mantle of the Act's limitation-of-liability provisions."[19/]

The extensive and certain system of benefits comports well with the requirements of military service and provides another reason for the Feres doctrine. When recruits join the armed forces, they know that they will face risks as well as receive benefits. Service members also know that they and their dependents will be adequately and fairly treated if they are injured, whatever the cause. Moreover, Congress has provided for a system of additional pay for individuals whose duties routinely expose them to recognized hazards.[20/]

The final policy consideration to which the Court made reference concerned the lack of uniformity that would result if, as the FTCA provides, the rights of servicemen were dependent on varying state laws. In Feres, the Supreme Court recognized that the relationship between the United States and its military personnel is distinctively federal in character. More specifically, the Court opined that the scope, nature, legal incidents, and consequences of this relationship are fundamentally derived from federal sources and governed by federal authority.[21/] The application of state law to these issues would be completely inappropriate.

The policy considerations relied upon by the Supreme Court in deciding Feres remain valid today. Nevertheless, the issue of whether or not an injury was incurred "incident to service" is frequently litigated. In resolving this question, courts have focussed on three factors: the location of the accident, the duty status of the service member, and military control of the injured party at the time of the acident. A long line of cases has denied recovery for on-base accidents even if the service member was off-duty.[22] This result follows because on-base service members are subject to military control. Military personnel may also be subject to military control when on leave status and off-base. For example, an injury was found incident to service where an off-duty service member on authorized leave was injured while traveling space-available on a military aircraft.[23]

Reservists and National Guard members, whether on active duty or inactive training status, have been consistently barred from recovery for otherwise "incident to service" injuries.[24] Veterans, including retired members, who suffer post-discharge torts, however, stand on an altogether different legal footing from active duty service members.[25] The most significant reason for this difference is that a veteran is not on active duty or subject to direct military control. The most litigated issue in this area concerns whether an injury is the result of a tort occurring before or after the discharge of the affected member.[26]

Medical malpractice represents another area where the "incident to service" standard and the military discipline rationale of Feres have come under close scrutiny.[27] It is well settled, nonetheless, that such suits by military personnel against the United States under the Federal Tort Claims Act are absolutely barred. The courts have taken a firm stand in holding that medical treatment provided to active duty members in a military facility is incident to service.[28]

Some service members faced with the "incident to service" defense have resorted to a private action against an individual, usually based on some type of alleged constitutional tort. Most courts rely on Feres considerations in denying personal liability in these cases. One court has succinctly stated this principle -- "It is not yet within the American legal concept that one soldier may sue another for negligent acts performed in line of duty.

The idea is that an undisciplined Army is a mob and he who is in it would weaken discipline if he can civilly litigate with others in the Army over the performance of another man's Army duty."[29]

This settled aspect of the Feres doctrine was recently challenged by a panel of the Ninth Circuit in the case of Wallace v. Chappell,[30] in which black Navy enlisted men sued officers and chief petty officers for $10 million for alleged racial discrimination. The plaintiffs argued that this discrimination led to their assignment to undesirable duties, exclusion from training programs, low performance evaluations, and imposition of unusually severe punishments for minor offenses.

This case is particularly significant in two respects. First, it held that, where constitutional claims are asserted, internal military decisions may in some circumstances be judicially reviewable if the plaintiff has exhausted his administrative remedies. The panel thus "opened the door" to numerous types of constitutional claims that were previously barred. Second, and more importantly, Wallace held that military officials, such as commanders and staff officers, who are amenable to suit have only qualified rather than absolute immunity from personal liability. Generally, qualified immunity protects a defendant who has acted reasonably and in good faith. While this holding may be superficially defensible, it would require commanders and other service personnel to justify their official actions in federal courts and would expose them to personal liability for their military conduct. Apart from diverting the services' resources and the defendants' energies from their primary missions, the threat of individual liability may well unduly influence commanders' decisions or even inhibit commanders from making difficult choices in a timely manner.

The Ninth Circuit itself is divided on whether the Feres doctrine precludes intramilitary suits for constitutional torts.

In Broudy v. United States,[31] another panel of the Circuit observed, "[T]he Feres doctrine bars claims against the Government for injuries sustained incident to military service, even if the claim is stated in constitutional terms."[32] The Court also refused to differentiate between intentional and negligent torts in applying the Feres bar when it held, "The Feres doctrine does not distinguish between claims based on the alleged level of culpability of the tortfeasor; whether a negligent, a reckless or even an interntional tort is alleged."[33]

Wallace represents a dangerous departure from a long series of cases recognizing the paramount necessity of governmental and personal immunity for acts incident to military service. The panel's opinion strikes at the very ability of the Armed Forces to fulfill their national defense responsibilities. The Department of Defense has requested the Department of Justice to petition the Supreme Court for certiorari in this anomalous case.[34]

In an opinion issued the same day as the Wallace case, the Third Circuit, sitting en banc, refused to weaken the Feres doctrine. In Jaffee v. United States,[35] a former serviceman and his wife pled a constitutional cause of action, asserting that the United States and individual defendants were liable in damages. Jaffee contended that he had been deliberately and knowingly exposed to radiation in 1953 while on active duty and that the exposure caused him to develop cancer in 1977. The Court upheld the longstanding rationale against liability in such circumstances. In reaching this result, the Court held that, under Feres, the United States and individual service members are absolutely immune from intramilitary tort actions. It observed that suits against individuals have an even greater potential for chilling responsible decision-making than those against the Government, and that litigation over intentional torts would disrupt military discipline as much as tort suits for negligence. Such suits, the Court opined, affect the relationship between the Government and the members of the Armed Forces, as well as relationships among the members themselves.[36/]

In conclusion, the Feres doctrine is of the utmost importance to the Department of Defense. Its retention is critical and necessary. The considerations of policy that supported the Supreme Court's establishment of the doctrine in 1950 are valid today, just as they were then. We strongly recommend that the doctrine be left intact.

## Footnotes

1. 28 U.S.C. §§1346(b), 2672, 2674.
2. 28 U.S.C. §2674.
3. 28 U.S.C. §2680.
4. E.g., 28 U.S.C. §2679(b) (drivers of motor vehicles); 38 U.S.C. §4116 (medical personnel employed by the Veterans Administration); 26 U.S.C. §7426(d) (employees levying on property to collect federal taxes immune from suit brought by persons other than the taxpayer claiming an interest in the property); 28 U.S.C. §1498 (employees sued for patent infringement); 46 U.S.C. §746 (employees sued for unlawful seizure of sea going vessels); 10 U.S.C. §1089 (medical personnel employed by the Armed Forces, Department of Defense, and Central Intelligence Agency).
5. 337 U.S. 49 (1949).
6. Id. at 52.
7. 340 U.S. 135 (1950).
8. Id. at 146.
9. L. Jayson, Handling Federal Tort Claims, §155.05 (1977).
10. Parker v. Levy, 417 U.S. 733, 758 (1974); see also O'Callahan v. Parker, 395 U.S. 258 (1969); Orloff v. Willoughby, 345 U.S. 83 (1953).
11. Feres v. United States, 340 U.S. 135, 141-143 (1950).
12. Zoula v. United States, 217 F.2d 81, 84 (5th Cir. 1955), quoting Feres v. United States, 340 U.S. 135, 145 (1950). See United States v. Lee, 400 F.2d 558, 562 (9th Cir. 1968); Henninger v. United States, 473 F.2d 814 (9th Cir. 1973); Parker v. United States, 437 F.Supp. 1039 (N.D. Tex. 1977).
13. 10 U.S.C §§1475 et seq.; 38 U.S.C. §§410, 901-908.

14. 39 U.S.C. §§310, 314.

15. 38 U.S.C. §315.

16. 38 U.S.C. §§722, 765.

17. 38 U.S.C. §§601-654.

18. See Veterans Administration statement.

19. *Cooper Stevedoring Co. v. Kopke, Inc.*, 417 U.S.C. 106, 115 (1974).

20. 37 U.S.C. §301 (submarine, flight crew, flight deck); 37 U.S.C. §304 (diving); 37 U.S.C. §305a (sea pay).

21. *Feres*, *supra*.

22. *E.g.* *Hass v. United States*, 518 F.2d 1138 (4th Cir. 1975) (Marine injured while riding a horse he rented from the base stables).

23. *Fass v. United States*, 191 F.Supp. 367 (E.D.N.Y. 1961).

24. *Mattos v. United States*, 412 F.2d 793 (9th Cir. 1969); *United States v. Carroll*, 369 F.2d 618 (8th Cir. 1966); *Herreman v. United States*, 476 F.2d 234 (7th Cir. 1973); *Layne v. United States*, 295 F.2d 433 (7th Cir. 1961).

25. *United States v. Brown*, 348 U.S. 110 (1954).

26. *Everett v. United States*, 492 F.Supp. 318 (S.D. Ohio 1980); *Thornwell v. United States*, 471 F.Supp. 344 (D.D.C. 1979); *Stanley v. Central Intelligence Agency*, 639 F.2d 1146 (5th Cir. 1981).

27. See Jacoby, *The Feres Doctrine*, 24 Hastings L.J. 1281 (1973).

28. *Harten v. Coons*, 502 F.2d 1363, 1365 (10th Cir. 1974); *Buer v. United States*, 241 F.2d 3 (7th Cir. 1956).

29. *Bailey v. Van Buskirk*, 345 F.2d 298 (9th Cir. 1965).

30. 661 F.2d 729 (9th Cir. 1981).

31. 661 F.2d 125 (9th Cir. 1981).

32. *Id.* at 127 n.3.

33. *Id.* at 127 n.4.

34. The *Wallace* case also conflicts with the law in the District of Columbia Circuit. *Misko v. United States*, 453 F.Supp. 513 (D.D.C. 1978), *aff'd*, 593 F.2d 1321 (D.C. Cir. 1979) (without opinion).

35. 663 F.2d 1226 (3d Cir. 1981).

36. Two bills, S. 1775 and H.R. 24, currently before Congress would amend the Federal Tort Claims Act so as to immunize federal officials from constitutional and common law tort actions involving conduct within the scope of their employment. These bills would substitute the United States as the party defendant in such cases.

Senator **Grassley**. Mr. Taft is our last witness, so I want to thank all of our witnesses at this point, all the people who have appeared, all the people in the audience who have been patient. I think we have created a fine record on the Feres doctrine. This record will remain open for 1 week, in the event that there is anything more that the witnesses would like to add on the topic. In the event that any member of this subcommittee has any questions of any of the witnesses, we would ask that the witnesses respond to the Senators' questions in writing.

Again, thank you for your testimony. The hearing is adjourned.

[Whereupon, at 10:55 a.m., the subcommittee was adjourned.]